

## Sued If You Do, Sued If You Don't: Section 2 of the Voting Rights Act as a Defense to Race-Conscious Districting

Caroline A. Wong†

### INTRODUCTION

Suppose that you work on a state legislative committee charged with drafting maps of your state's electoral districts. Recently, constituents have contacted their representatives in the legislature to complain that the current district lines significantly dilute the influence of minority votes in some areas of the state. The constituents demand a change and warn that, in the event that no change is made, they will bring a lawsuit against the state under § 2 of the Voting Rights Act of 1965.<sup>1</sup> After studying the relevant law, your committee agrees that the current district plan may contravene § 2, which prohibits states from adopting plans that result in minority-vote dilution.<sup>2</sup> To avoid litigation, your committee decides to draft a new district plan to remedy the § 2 violation. In choosing a strategy for drafting the remedial plan, your committee decides that it must account for racial demographics. After all, a strictly race-neutral methodology might fail to effectively correct the § 2 violation, or it might inadvertently give rise to a separate § 2 violation in another part of the state.<sup>3</sup>

But pursuing a race-conscious approach may be no better than jumping out of the frying pan and into the fire.<sup>4</sup> The

---

† BM 2012, Indiana University–Bloomington; JD Candidate 2016, The University of Chicago Law School.

<sup>1</sup> Pub L No 89-110, 79 Stat 437, 437, codified as amended at 52 USC § 10301.

<sup>2</sup> 52 USC § 10301. See also *Thornburg v Gingles*, 478 US 30, 46–51 (1986).

<sup>3</sup> Section 2 liability attaches whenever a state's district plan results in vote dilution, regardless of whether state actors intended to dilute votes or consciously considered racial demographics when drafting the plan. See *Gingles*, 478 US at 43–44.

<sup>4</sup> See Laurentius Abstemius, *The Fishes and the Frying Pan*, in Roger L'Estrange, ed, *Fables of Aesop and Other Eminent Mythologists: With Morals and Reflexions* 289, 289 (printed for Sare, et al, 5th ed 1708) (“A Cook was Frying a Dish of *Live Fish*, and so soon as ever they felt the Heat of the Pan. There's no Enduring of This, cry'd one, and so they all Leapt into the Fire; and instead of Mending the Matter, they were Worse now than Before.”).

problem is that while race-conscious remedial districting may avert litigation over a § 2 violation, it simultaneously opens the door to a lawsuit in which the remedial plan may be challenged as an unconstitutional racial classification under the Fourteenth Amendment's Equal Protection Clause.<sup>5</sup> A state that finds itself potentially in violation of § 2 is thus placed in a seemingly "impossible position."<sup>6</sup> Whether it decides to forgo or pursue race-conscious remedial districting, the state leaves itself exposed to liability for violating either § 2 of the Voting Rights Act or the Equal Protection Clause, respectively.

In an effort to resolve this predicament, a few states have responded to equal protection racial gerrymandering challenges by arguing that compliance with § 2 constitutes an affirmative defense against claims of race-conscious districting. Whether such a § 2 defense is legally cognizable, however, is a question that remains unresolved. The issue of the defense's viability has been raised twice before the United States Supreme Court, but both times the justices have expressly declined to address it.<sup>7</sup> As a result, state governments—as well as courts<sup>8</sup> and districting-litigation plaintiffs<sup>9</sup>—have been left without answers to critical questions about the extent to which § 2 requires, justifies, or forbids the incorporation of race-conscious principles in the design of electoral districts. Thus, on the question whether § 2 necessitates or permits race-conscious districting, Alabama Solicitor General Andrew Brasher spoke for many when he confessed during oral argument in a recent racial gerrymandering case: "I

---

<sup>5</sup> US Const Amend XIV, § 2. See also, for example, *Miller v Johnson*, 515 US 900, 917, 928 (1995) (striking down a district plan under the Equal Protection Clause on the grounds that race had been the predominant factor motivating the plan's design).

<sup>6</sup> *League of United Latin American Citizens v Perry*, 548 US 399, 518 (2006) (Scalia concurring in the judgment in part and dissenting in part) (characterizing the dilemma that a state faces when it must choose between compliance with the Voting Rights Act and compliance with the Equal Protection Clause).

<sup>7</sup> See *Shaw v Hunt*, 517 US 899, 915 (1996); *Bush v Vera*, 517 US 952, 977 (1996) (O'Connor) (plurality).

<sup>8</sup> When a court strikes down a state's district plan, it may become responsible for redrawing that state's district lines by judicial order. In fulfilling that responsibility, courts have a direct interest in knowing the extent to which § 2 requires or permits race-conscious districting because courts too must avoid redistricting in a manner that violates the Voting Rights Act or the Equal Protection Clause. See *Abrams v Johnson*, 521 US 74, 79 (1997), citing *Upham v Seamon*, 456 US 37, 43 (1982).

<sup>9</sup> Districting-litigation plaintiffs sometimes propose remedial district plans for adoption by judicial order; thus, they also have an interest in the resolution of these issues. See, for example, *Georgia State Conference of the NAACP v Fayette County Board of Commissioners*, 950 F Supp 2d 1294, 1303 (ND Ga 2013) (questioning the extent to which the plaintiffs' proposed remedial district plan could permissibly account for race).

really honestly do not know how Section 2 would necessarily apply.”<sup>10</sup>

Given the frequency of districting litigation,<sup>11</sup> questions about the proper application of § 2 demand resolution. This Comment endeavors to answer those questions. Part I canvasses the legislative history of § 2 and provides an overview of the doctrinal frameworks governing federal claims of vote dilution and racial gerrymandering. Part II examines the various attempts that states have made to raise the § 2 defense in response to racial gerrymandering and state constitutional claims. Finally, Part III argues that § 2 indeed offers a legally cognizable defense against claims of racial districting, for both doctrinal and normative reasons. It then envisages how courts could apply the § 2 defense in a way that would benefit states raising the defense in good faith but filter out states merely seeking to evade liability for unjustifiable race-based action. In light of the defense’s application in the contexts of vote dilution and racial gerrymandering, Part III also explains that states might avoid violations of both § 2 and the Equal Protection Clause by creating racially integrated coalitional districts.

#### I. SECTION 2 OF THE VOTING RIGHTS ACT AND RACIAL-DISTRICTING CLAIMS

Hailed on the day of its enactment as “a triumph for freedom,”<sup>12</sup> the Voting Rights Act of 1965<sup>13</sup> has indelibly remolded the election-law landscape over the past five decades. Section 2 of the Act, aimed at dismantling racially discriminatory state voting practices, has become the font of a robust and complex body of law governing electoral districting. Proceeding in two sections, this Part begins by situating the Voting Rights Act within the context of the civil rights movement and detailing the

---

<sup>10</sup> Transcript of Oral Argument, *Alabama Legislative Black Caucus v Alabama*, Docket No 13-895, \*60 (US Nov 12, 2014) (available on Westlaw at 2014 WL 5844290).

<sup>11</sup> As of January 1, 2015, redistricting in the wake of the 2010 United States Census has prompted districting litigation in forty-two states, including racial-districting litigation in Alabama, Arkansas, California, Florida, Illinois, Louisiana, Maryland, Michigan, New Mexico, New York, North Carolina, South Carolina, Texas, Virginia, and Wisconsin. For a database collecting information about this litigation, see generally *Litigation in the 2010 Cycle* (Loyola Law School–LA), archived at <http://perma.cc/YJ4S-RYXV> (tracking the proceedings of districting litigation nationwide).

<sup>12</sup> President Lyndon B. Johnson, *Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act*, 1965 Pub Papers 840, 840.

<sup>13</sup> Pub L No 89-110, 79 Stat 437, codified as amended at 52 USC § 10101 et seq.

legislative history of § 2. It then surveys the development of case law concerning federal racial-districting claims under both § 2 and the Fourteenth Amendment's Equal Protection Clause.<sup>14</sup>

#### A. The Background and Legislative History of § 2

In the United States, voting rights have often been closely intertwined with issues of race. The right to vote free of race-based restrictions was constitutionalized in 1870 by the Fifteenth Amendment,<sup>15</sup> the ratification of which was driven in part by the need to protect African Americans' voting rights in the wake of the Civil War.<sup>16</sup> Later voting-rights legislation was enacted concurrently with the development of the African American civil rights movement in the 1950s and 1960s.<sup>17</sup> The Voting Rights Act of 1965 itself arose directly from the advocacy efforts of civil rights activists<sup>18</sup> and aimed to dislodge state voting practices that tended to disenfranchise minority voters, such as literacy tests and poll taxes.<sup>19</sup>

Section 2 is the centerpiece of the Voting Rights Act. In its originally enacted version, § 2 prohibited states from imposing any “standard, practice or procedure . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color.”<sup>20</sup> This language closely tracked that of the Fifteenth Amendment, which broadly decrees 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.”<sup>21</sup>

---

<sup>14</sup> Throughout this Comment, the term “racial-districting claims” is used to refer broadly to all claims that challenge districts as racially discriminatory, whether premised on § 2 of the Voting Rights Act, the Equal Protection Clause, or both.

<sup>15</sup> US Const Amend XV, § 1.

<sup>16</sup> See Emma C. Jordan, *The Future of the Fifteenth Amendment*, 28 Howard L J 541, 546–48 (1985).

<sup>17</sup> See Civil Rights Act of 1957 § 131, Pub L No 85-315, 71 Stat 634, 637–38, codified as amended at 52 USC § 10101; Civil Rights Act of 1960 § 601, Pub L No 86-449, 74 Stat 86, 90–92, codified as amended at 52 USC § 10101. For a comprehensive historical account of the African American civil rights movement, see generally Peter B. Levy, *The Civil Rights Movement* (Greenwood 1998).

<sup>18</sup> See Gary May, *Bending toward Justice: The Voting Rights Act and the Transformation of American Democracy* 48, 148 (Basic Books 2013).

<sup>19</sup> See Adam B. Cox and Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U Chi L Rev 1493, 1496–98 (2008).

<sup>20</sup> Voting Rights Act of 1965 § 2, 79 Stat at 437.

<sup>21</sup> US Const Amend XV, § 1.

In the first two decades after its enactment, disenfranchised plaintiffs rarely relied on § 2.<sup>22</sup> Instead, voting-rights cases during that period were almost always brought under the Reconstruction Amendments or under alternative provisions of the Voting Rights Act.<sup>23</sup> But the tides began to turn in 1980 when the Supreme Court heard its first § 2 vote dilution case—*City of Mobile, Alabama v Bolden*<sup>24</sup>—and issued a decision that threatened to severely restrain the potential strength of § 2's protections. In *Bolden*, a plurality of the justices held that because § 2's language “no more than elaborate[d] upon that of the Fifteenth Amendment,”<sup>25</sup> a plaintiff could establish a § 2 violation only by proving that a state had adopted a given voting practice with an *intent* to discriminate on the basis of race.<sup>26</sup> Requiring proof of such intent placed an enormous burden on plaintiffs seeking to challenge voting practices as racially discriminatory, and this aspect of *Bolden* accordingly garnered “a firestorm of criticism and protest in the legal community.”<sup>27</sup>

In reaction to *Bolden*, Congress amended § 2 to prohibit the use of any “standard, practice, or procedure . . . which *results* in a denial or abridgment of the right of any citizen of the United States to vote on account of race,” thereby abrogating *Bolden's* intent requirement and bolstering the robustness of § 2's protections.<sup>28</sup> Congress's post-*Bolden* amendments further specify that state practices may not cause racial minorities to have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” The amendments also instruct courts to employ a totality-of-the-circumstances test to ascertain whether a given state practice

---

<sup>22</sup> See Cox and Miles, 75 U Chi L Rev at 1497 (cited in note 19).

<sup>23</sup> See *id.* See also, for example, *Allen v State Board of Elections*, 393 US 544, 553–54 (1969) (involving voting-rights claims brought under the Fourteenth Amendment and § 5 of the Voting Rights Act).

<sup>24</sup> 446 US 55 (1980).

<sup>25</sup> *Id.* at 60 (Stewart) (plurality).

<sup>26</sup> *Id.* at 60–62 (Stewart) (plurality).

<sup>27</sup> Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, in Chandler Davidson, ed., *Minority Vote Dilution* 85, 100–01 (Howard 1989). See also *Voting Rights Act Extension*, S Rep No 97-417, 97th Cong, 2d Sess 16 (1982), reprinted in 1982 USCCAN 177, 196 (denouncing the Court's decision in *Bolden* for “plac[ing] an unacceptably difficult burden on plaintiffs”).

<sup>28</sup> Act of 1982 § 3, Pub L No 97-205, 96 Stat 131, 134, codified at 52 USC § 10301 (emphasis added).

violates § 2.<sup>29</sup> As demonstrated in the next Section, racial-districting litigation under § 2 has proliferated widely since the addition of these amendments.

## B. Bringing a Racial-Districting Claim: The Prima Facie Case

Under federal law, a plaintiff has two avenues for challenging a state's district plan as racially discriminatory. First, she can bring suit under § 2 of the Voting Rights Act and allege that the plan results in the unlawful dilution of minority votes.<sup>30</sup> Second, she can bring suit under the Fourteenth Amendment's Equal Protection Clause and allege that the plan is an unconstitutional gerrymander designed predominantly on the basis of racial considerations.<sup>31</sup> The legal regimes governing each of these claims are "analytically distinct"<sup>32</sup> and are discussed in turn in this Section.

### 1. Vote dilution claims under § 2.

To establish a prima facie case of minority-vote dilution under § 2, a plaintiff must show that: (1) the relevant minority group is "sufficiently large and geographically compact" to feasibly constitute a numerical majority of the citizen voting-age population in a single-member legislative district, (2) the minority group is "politically cohesive," and (3) the majority group in the relevant geographic region "votes sufficiently as a bloc" to defeat the minority group's preferred political candidates.<sup>33</sup> Nicknamed "the *Gingles* preconditions" after the seminal case

---

<sup>29</sup> Act of 1982 § 3, 96 Stat at 134. The amendments also clarify, however, that § 2 does not require states to ensure that minority candidates are elected in numbers proportional to their states' minority populations. Act of 1982 § 3, 96 Stat at 134.

<sup>30</sup> See, for example, *Thornburg v Gingles*, 478 US 30, 34–35 (1986).

<sup>31</sup> See, for example, *Hunt v Cromartie*, 526 US 541, 543 (1999). In theory, plaintiffs also have the option of using the Fourteenth Amendment as a basis for constitutional vote dilution claims. See, for example, *Rogers v Lodge*, 458 US 613, 617, 627 (1982) (affirming the district court's finding that a challenged district plan diluted minority votes in violation of the Fourteenth Amendment). Such claims, however, have historically been unsuccessful and have fallen out of fashion since 1982, when Congress broadened the scope of § 2 in response to *Bolden*. See, for example, *White v Regester*, 412 US 755, 763 (1973) (rejecting the plaintiffs' Fourteenth Amendment vote dilution claim); *Whitcomb v Davis*, 403 US 124, 157–60 (1971) (same).

<sup>32</sup> *Shaw v Reno*, 509 US 630, 652 (1993) ("Shaw I").

<sup>33</sup> *Gingles*, 478 US at 50–51, 63. See also *Bartlett v Strickland*, 556 US 1, 14, 18–19 (2009) (Kennedy) (plurality) (clarifying that a "numerical majority" is defined as 50 percent or more of the citizen voting-age population in the relevant geographic area for purposes of the first of these three requirements).

*Thornburg v Gingles*,<sup>34</sup> these three evidentiary requirements speak to causation; without them, minority voters cannot show that a challenged district plan “result[ed] in . . . abridgement”<sup>35</sup> of their right to vote within the meaning of § 2.<sup>36</sup>

After establishing the *Gingles* preconditions, a plaintiff must also demonstrate that the totality of the circumstances substantiates the alleged dilutive effects of the challenged plan.<sup>37</sup> In weighing the totality of the circumstances, courts typically consider the seven factors set forth by the Senate Judiciary Committee in a report accompanying the post-*Bolden* amendments to § 2: (1) the history of discriminatory voting-related practices in the relevant state; (2) whether voting in the state is “racially polarized”; (3) whether the state has used “voting practices or procedures that may enhance the opportunity for discrimination against the minority group”; (4) whether minorities have been denied access to “candidate slating process[es]”; (5) whether minorities “bear the effects of discrimination in such areas as education, employment, and health”; (6) whether political campaigns in the state make “racial appeals”; and (7) whether minorities “have been elected to public office in the jurisdiction.”<sup>38</sup> The Senate report also lists two other factors of secondary significance: whether elected officials in the state tend to be unresponsive to the “particularized needs” of minority groups, and whether the policies offered to justify the state’s allegedly discriminatory voting practices are merely “tenuous.”<sup>39</sup>

Several legal theories are available to a plaintiff seeking to bring a vote dilution claim. In particular, three distinct theories of vote dilution have emerged from the case law: vote

---

<sup>34</sup> 478 US 30 (1986).

<sup>35</sup> 52 USC § 10301(a).

<sup>36</sup> See *Gingles*, 478 US at 50 n 17 (“Unless minority voters possess the potential to elect representatives in the absence of the challenged structure of practice, they cannot claim to have been injured by that structure or practice.”) (emphasis omitted).

<sup>37</sup> See *Johnson v De Grandy*, 512 US 997, 1010–12 (1994); *Voinovich v Quilter*, 507 US 146, 157 (1993). See also 52 USC § 10301(b) (providing that a § 2 violation is established if it is shown by a “totality of the circumstances” that “members of a [racial] class of citizens . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”).

<sup>38</sup> *Gingles*, 478 US at 36–37, quoting S Rep No 97-417 at 28–29 (cited in note 27).

<sup>39</sup> *Gingles*, 478 US at 37, quoting S Rep No 97-417 at 29 (cited in note 27). In sum, the totality-of-the-circumstances test grants judges significant analytical flexibility and has the potential to vary widely in application from court to court. One empirical study indicates that the precise manner in which a judge assesses the totality of the circumstances in this context may depend heavily on his or her individual political ideology or race. See Cox and Miles, 75 U Chi L Rev at 1519–24, 1535–36 (cited in note 19).

subsumption, vote fragmentation, and vote packing. Discussed in turn below, each theory of vote dilution has been at issue in at least one case arising before the Supreme Court in recent decades.

a) *Vote subsumption*. One of the earliest forms of vote dilution recognized by the Supreme Court, vote subsumption occurs when a state draws a large multimember legislative district as an alternative to smaller single-member districts in a way that ensures that minority voters in the relevant geographic area will remain politically weak.<sup>40</sup> The designation of an electoral district as “multimember” or “single-member” refers to the number of representatives that are elected at large from within the district.<sup>41</sup> In particular, a multimember district employs a system by which several members of the legislature are elected simultaneously, whereas a single-member district involves a voting scheme in which only one legislative representative is elected from the district.<sup>42</sup> Accordingly, a multimember district can engender minority-vote dilution whenever it is large enough to overwhelm the voting preferences of small minority communities that would have otherwise held politically influential majorities or pluralities in a system of single-member districts.

*Gingles* itself involved allegations of vote subsumption. The plaintiffs challenged six multimember state legislative districts in North Carolina as precipitating this type of vote dilution in violation of § 2.<sup>43</sup> The plaintiffs argued that the state’s “decision to employ multimember, rather than single-member, districts in the contested jurisdictions dilute[d] [African American] votes by submerging them in a white majority, thus impairing [the plaintiffs’] ability to elect representatives of their choice.”<sup>44</sup> After formulating the three preconditions that would thereafter govern all § 2 vote dilution claims, the Court reviewed the district court’s factual findings for clear error and concluded that the challenged districts resulted in unlawful vote dilution.<sup>45</sup> The application of the three *Gingles* preconditions, however, has since been expanded beyond the vote-subsumption context and

---

<sup>40</sup> See *Gingles*, 478 US at 46.

<sup>41</sup> See John F. Banzhaf III, *Multi-member Electoral Districts—Do They Violate the “One Man, One Vote” Principle*, 75 Yale L J 1309, 1309 (1966).

<sup>42</sup> See Douglas J. Amy, *Behind the Ballot Box: A Citizen’s Guide to Voting Systems* 67–68 (Praeger 2000).

<sup>43</sup> *Gingles*, 478 US at 34–35.

<sup>44</sup> *Id.* at 46.

<sup>45</sup> *Id.* at 80.



transported into the Court's analyses of vote-fragmentation and vote-packing claims as well.

*b) Vote fragmentation.* A district plan can also effect vote dilution by carving a geographically compact minority community into two or more fragments and then allocating those fragments across multiple districts, whether multimember or single member.<sup>46</sup> The dilutive mechanism of vote fragmentation is similar to that of vote subsumption: both submerge racial minorities within electoral districts in a way that prevents their voting preferences from meaningfully influencing political processes. Colloquially, vote fragmentation has been termed "cracking," which the Supreme Court has defined as "the splitting of a group or party among several districts to deny that group or party a majority in any of those districts."<sup>47</sup>

The first Supreme Court cases to apply the *Gingles* framework to vote-fragmentation claims were *Grove v Emison*<sup>48</sup> and *Johnson v De Grandy*.<sup>49</sup> In *Emison*, the plaintiffs alleged that congressional and state legislative districts in Minneapolis had diluted minority votes by "needlessly fragment[ing] two Indian reservations and divid[ing] the minority population of Minneapolis" when the members of that population could have instead been grouped into a single, cohesive district.<sup>50</sup> Similarly, in *De Grandy*, black and Hispanic voters challenged a Florida district plan on the grounds that it "unlawfully fragment[ed] cohesive minority communities" in the Miami-Dade County area into separate single-member districts.<sup>51</sup> Though both the *Emison* and *De Grandy* plaintiffs prevailed in their respective district courts,<sup>52</sup> the Supreme Court ultimately rejected both sets of claims. In *Emison*, the Court held that the district court had

---

<sup>46</sup> See, for example, *League of United Latin American Citizens v Perry*, 548 US 399, 423–27 (2006) ("LULAC"); *Grove v Emison*, 507 US 25, 28 (1993); *De Grandy*, 512 US at 1000–02.

<sup>47</sup> *Vieth v Jubelirer*, 541 US 267, 286 n 7 (2004) (Scalia) (plurality).

<sup>48</sup> 507 US 25 (1993).

<sup>49</sup> 512 US 997 (1994).

<sup>50</sup> *Emison*, 507 US at 28.

<sup>51</sup> *De Grandy*, 512 US at 1000–02 (quotation marks omitted).

<sup>52</sup> *Emison v Grove*, 782 F Supp 427, 439–40, 448 (D Minn 1992) (three-judge panel), revd and remd, *Emison*, 507 US 25; *De Grandy v Wetherell*, 815 F Supp 1550, 1574, 1580 (ND Fla 1992) (three-judge panel), affd in part and revd in part, *De Grandy*, 512 US 997. Federal circuit court precedent in this area of law is relatively scarce because cases involving challenges to electoral districts may be appealed directly from the federal district courts to the United States Supreme Court. See 28 USC §§ 1253, 2284; 52 USC § 10303(a)(5).

clearly erred in finding that the second and third *Gingles* preconditions had been satisfied, because the record “contain[ed] no statistical evidence of minority political cohesion . . . or of majority bloc voting.”<sup>53</sup> Likewise, in *De Grandy*, the Court avoided a conclusive analysis of the three *Gingles* preconditions but held that the totality-of-the-circumstances factors weighed in the state’s favor.<sup>54</sup> In reaching this conclusion, the Court chiefly relied on minority voters’ documented ability to form effective voting majorities in numbers roughly proportional to their respective shares of the citizen voting-age population in the Miami-Dade County area.<sup>55</sup>

The next major vote-fragmentation case to reach the Supreme Court did not come until over a decade after *Emison* and *De Grandy*, when the Court heard *League of United Latin American Citizens v Perry*<sup>56</sup> (“LULAC”) in 2006. In *LULAC*, the plaintiffs alleged that a Texas congressional district plan had diluted the strength of the Latino vote through vote fragmentation.<sup>57</sup> In contrast to its findings in *Emison* and *De Grandy*, the Court in *LULAC* expressly held that all three *Gingles* preconditions had been satisfied, both because Latinos had constituted a citizen voting-age majority in the challenged district prior to the plan’s enactment and because there was substantial evidence of racially polarized voting within that district.<sup>58</sup> The Court further held that the totality of the circumstances corroborated the plaintiffs’ vote dilution claim.<sup>59</sup> In particular, the Court pointed to the history of voting discrimination in Texas, the disproportionately low number of Texas congressional districts in which Latinos composed a citizen voting-age majority, and the incumbent representatives’ unresponsiveness to Latinos’ “particularized” political interests.<sup>60</sup>

c) *Vote packing*. Perhaps the least commonly recognized theory of vote dilution, vote packing occurs when a district plan crowds an artificially high number of minority voters into a single district, thereby preventing their votes from meaningfully

---

<sup>53</sup> *Emison*, 507 US at 41 (quotation marks omitted).

<sup>54</sup> *De Grandy*, 512 US at 1008–09.

<sup>55</sup> *Id.* at 1013–15.

<sup>56</sup> 548 US 399 (2006).

<sup>57</sup> *Id.* at 423–27.

<sup>58</sup> *Id.* at 427–28.

<sup>59</sup> *Id.* at 442.

<sup>60</sup> *LULAC*, 548 US at 438–40 (quotation marks omitted).

influencing election outcomes in other districts.<sup>61</sup> In other words, “[p]acking’ refers to the practice of filling a district with a supermajority of a given group or party.”<sup>62</sup>

*Voinovich v Quilter*<sup>63</sup> was the first case in which the Supreme Court addressed a § 2 vote-packing claim.<sup>64</sup> In that case, the plaintiffs challenged eight of Ohio’s state legislative districts on the grounds that African American voters had been disproportionately packed into those districts in a way that considerably diminished the political influence they would otherwise have wielded across other districts.<sup>65</sup> The Court disposed of the case for the same reason that it had ruled in favor of the state defendants in *Emison*: the plaintiffs failed to satisfy the *Gingles* preconditions because the record lacked evidence that voting patterns in Ohio were racially polarized.<sup>66</sup>

Vote subsumption, vote fragmentation, and vote packing are not the only theories available to a plaintiff seeking to strike down a district plan as racially discriminatory. Alternatively, a plaintiff may separately advance an equal protection theory of unlawful racial districting, as the next Section explains.

## 2. Racial gerrymandering claims under the Equal Protection Clause.

In addition to challenging the legality of district plans under § 2 of the Voting Rights Act, plaintiffs may challenge district plans as unconstitutional under the Fourteenth Amendment’s Equal Protection Clause. The prototypical equal protection districting claim alleges racial gerrymandering, which courts have defined as “the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.”<sup>67</sup> The theory underlying such a claim is that a state’s intentional use of race as the basis for sorting voters into districts relies on harmful stereotypes and segregates voters in a manner incompatible with the Fourteenth Amendment’s

---

<sup>61</sup> See, for example, *Quilter*, 507 US at 149–51.

<sup>62</sup> *Vieth*, 541 US at 286 n 7 (Scalia) (plurality).

<sup>63</sup> 507 US 146 (1993).

<sup>64</sup> Id at 149–50. Note that vote-packing claims have also been referred to as “influence-dilution claims.” Id at 154.

<sup>65</sup> Id at 149–50.

<sup>66</sup> See id at 158.

<sup>67</sup> *Davis v Bandemer*, 478 US 109, 164 (1986), quoting *Kirkpatrick v Preisler*, 394 US 526, 538 (1969) (Fortas concurring).

guarantee of equal protection under the law.<sup>68</sup> As such, any district plan that is intentionally designed in accordance with race-conscious principles—including but not limited to plans that result in vote subsumption, vote fragmentation, or vote packing<sup>69</sup>—may be susceptible to an equal protection challenge.

To prevail on an equal protection claim of racial gerrymandering, a plaintiff must prove that race was the “predominant” motivation for the challenged district’s design by showing that the state subordinated traditional, judicially recognized districting principles to racial considerations.<sup>70</sup> Such traditional districting principles include compactness,<sup>71</sup> contiguity,<sup>72</sup> and respect for communities that are defined by shared political interests.<sup>73</sup> Plaintiffs may attempt to expose a departure from these principles by showing that districts have relatively “bizarre” shapes.<sup>74</sup> They can also use computer algorithms and modeling software to demonstrate that districts are homogeneous with respect to race but not with respect to other community characteristics.<sup>75</sup>

If a plaintiff successfully makes a prima facie showing of racial gerrymandering, the court then evaluates whether the district plan survives strict scrutiny.<sup>76</sup> One of the most demanding forms of judicial review, strict scrutiny requires a court to inquire whether a challenged state law furthers a “compelling interest” and is “narrowly tailored” to further that interest.<sup>77</sup> If the

---

<sup>68</sup> See *Miller v Johnson*, 515 US 900, 911–12 (1995). See also Richard H. Pildes and Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 Mich L Rev 483, 506–09 (1993) (characterizing the injury caused by racial gerrymanders as an “expressive harm”).

<sup>69</sup> See Part I.B.1 (elaborating on these three types of race-conscious districting).

<sup>70</sup> *Johnson*, 515 US at 916.

<sup>71</sup> See Note, *Reapportionment*, 79 Harv L Rev 1228, 1285 (1966) (“[T]he compactness of a legislative district can be measured by determining the extent to which its area deviates from the area of the smallest circle that completely circumscribes the district.”). For attempts to more rigorously define “compactness” using various quantitative approaches, see Pildes and Niemi, 92 Mich L Rev at 553–69 (cited in note 68); Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 Harv L Rev 1903, 1967–80 (2012).

<sup>72</sup> See Note, 79 Harv L Rev at 1284 (cited in note 71) (“A contiguous district is one in which a person can go from any point within the district to any other point without leaving the district.”).

<sup>73</sup> See *Johnson*, 515 US at 916.

<sup>74</sup> *Bush v Vera*, 517 US 952, 979 (1996) (O’Connor) (plurality).

<sup>75</sup> See Micah Altman and Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 Duke J Const L & Pub Pol 69, 72–79 (2010) (describing the role of computer software in modern electoral-districting processes).

<sup>76</sup> See, for example, *Shaw I*, 509 US at 644; *Johnson*, 515 US at 913–14.

<sup>77</sup> 16B Am Jur 2d Constitutional Law § 862 at 316–17 (2009). See also Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 Am J

government cannot convince the court that the state law at issue satisfies both prongs of strict scrutiny review, then the court must strike down the law as unconstitutional.<sup>78</sup> Thus, when strict scrutiny is triggered in the racial gerrymandering context, a challenged district plan will stand only if the state can show that the plan was narrowly tailored to advance some compelling government interest.<sup>79</sup>

The legal regimes governing equal protection and § 2 claims thus differ in two noteworthy respects. First, a plaintiff bringing an equal protection claim must prove that state officials *intentionally* considered race when designing the district plan at issue.<sup>80</sup> In contrast, Congress's post-*Bolden* amendments to the Voting Rights Act ensured that intent need not be proven as an element of a § 2 claim.<sup>81</sup> Accordingly, at least in this respect, a plaintiff will bear a heavier burden of proof if she chooses to challenge a district plan under the Equal Protection Clause instead of under § 2.<sup>82</sup> On the other hand, an equal protection challenge does not require an inquiry into the demographic voting patterns of various racial groups in the relevant jurisdiction.<sup>83</sup> Thus, a racial-districting claim that takes the form of an equal protection challenge may have some advantages over one brought under § 2, because an equal protection plaintiff does not need to hurdle the fact-intensive *Gingles* preconditions or § 2's totality-of-the-circumstances inquiry to prevail.

*Shaw v Reno*<sup>84</sup> ("Shaw I") was the first case in which the Supreme Court recognized a claim of racial gerrymandering under the Equal Protection Clause.<sup>85</sup> The dispute in *Shaw I* arose from

---

Legal Hist 355, 358 (2006) (comparing strict scrutiny to other, more-permissive forms of judicial review, such as "intermediate scrutiny" and "rationality review").

<sup>78</sup> See 16B Am Jur 2d Constitutional Law § 862 at 315–17 (2009).

<sup>79</sup> See, for example, *Johnson*, 515 US at 915; *Cromartie*, 526 US at 543.

<sup>80</sup> See, for example, *Cromartie*, 526 US at 546.

<sup>81</sup> See text accompanying notes 24–28.

<sup>82</sup> This burden, however, is lighter in cases in which districts are particularly egregiously misshaped, because it is easier for the plaintiffs in such cases to convince a court that district designs are explainable only on racial grounds. See, for example, Figure 1 and text accompanying notes 85–92.

<sup>83</sup> See, for example, *Shaw I*, 509 US at 642–49.

<sup>84</sup> 509 US 630 (1993).

<sup>85</sup> Earlier racial gerrymandering cases were often decided under the Fifteenth Amendment rather than the Fourteenth Amendment. See, for example, *Gomillion v Lightfoot*, 364 US 339, 345–48 (1960) (analyzing the constitutionality of racial gerrymanders under the Fifteenth Amendment). The Fourteenth Amendment, however, has since come to dominate the arena of voting-rights litigation because the Court has come to interpret the Fourteenth Amendment as prohibiting a category of voting-rights claims

a redistricting plan in North Carolina that created two majority-minority districts to give greater effect to the votes of African American citizens.<sup>86</sup> A majority-minority district is an electoral district in which a group that is nationally a racial or ethnic minority comprises a majority of the citizen voting-age population.<sup>87</sup> In *Shaw I*, white voters in North Carolina challenged the majority-minority districts at issue as racial classifications violative of the Equal Protection Clause.<sup>88</sup> The case reached the Supreme Court on the threshold question whether the plaintiffs had stated an equal protection claim capable of surviving the state defendants' motion to dismiss.<sup>89</sup> The Court answered this question in the affirmative, reasoning that the shapes of the challenged districts "[could not] be understood as anything other than an effort to separate voters into different districts on the basis of race."<sup>90</sup> Consequently, it remanded the case with instructions for the district court to engage in strict scrutiny review of the challenged districts.<sup>91</sup> The shapes of those districts, Districts 1 and 12, are depicted below in Figure 1.<sup>92</sup> Both districts appear in black on the map and are readily describable as so "bizarre"<sup>93</sup> that they are "irrational on [their] face."<sup>94</sup>

---

(including vote dilution claims) that is broader than that prohibited by the Fifteenth Amendment. See *Shaw I*, 509 US at 640–45 (tracing the history of *Gomillion* and subsequent related cases to explain the *Shaw I* Court's decision to evaluate racial gerrymandering under the Fourteenth Amendment instead of the Fifteenth Amendment); Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 15 (Foundation 4th ed 2012) (describing the Equal Protection Clause as "[t]he major source of constitutional voting rights litigation").

<sup>86</sup> *Shaw I*, 509 US at 633–34.

<sup>87</sup> See *Strickland*, 556 US at 13 (Kennedy) (plurality).

<sup>88</sup> *Shaw I*, 509 US at 636–37.

<sup>89</sup> *Id.* at 634.

<sup>90</sup> *Id.* at 649.

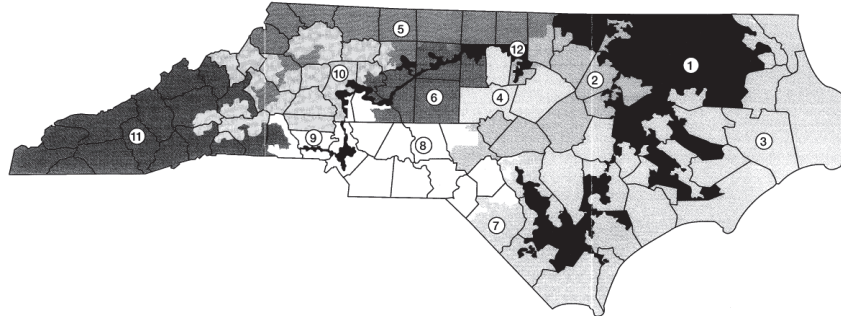
<sup>91</sup> *Id.* at 658. Three years after *Shaw I* was remanded, the case returned to the Supreme Court as *Shaw v Hunt*, 517 US 899 (1996) ("Shaw II"). For a discussion of *Shaw II*, see Part II.A.

<sup>92</sup> For an original copy of the map shown in Figure 1, see *Shaw I*, 509 US at Appendix.

<sup>93</sup> *Id.* at 644.

<sup>94</sup> *Id.* at 652.

FIGURE 1. MAP OF THE DISTRICT PLAN CHALLENGED IN *SHAW V RENO*



Another racial gerrymandering case, *Miller v Johnson*,<sup>95</sup> reached the Court two years later, this time presenting the justices with the question of what constitutes a “compelling state interest” for purposes of strict scrutiny review of a racial gerrymander.<sup>96</sup> The plaintiffs, again a group of white voters,<sup>97</sup> challenged the constitutionality of the Eleventh District of Georgia’s 1992 congressional district plan.<sup>98</sup> The Court noted that the Eleventh District was “[g]eographically . . . a monstrosity,” “[e]xtending from Atlanta to the Atlantic” and sprawling across the state of Georgia to tie together “four discrete, widely spaced urban centers” that were densely populated by African Americans.<sup>99</sup> Figure 2 shows a map of the Eleventh District’s shape and population density, with the largest dark regions of the map indicating the locations of the urban areas to which the Court referred. Figure 3 shows a map of Georgia’s entire 1992 congressional district plan, with the Eleventh District appearing at the map’s center and stretching across nearly the entire width of the state.<sup>100</sup>

<sup>95</sup> 515 US 900 (1995).

<sup>96</sup> *Id.* at 903–04.

<sup>97</sup> See *id.* at 929–30 (Stevens dissenting) (noting the plaintiff-appellants’ race).

<sup>98</sup> *Id.* at 909.

<sup>99</sup> *Johnson*, 515 US at 908–09 (quotation marks omitted).

<sup>100</sup> For original copies of the maps shown in Figures 2 and 3, see *id.* at Appendices A–B.

FIGURE 2. POPULATION DENSITY MAP OF THE DISTRICT CHALLENGED IN *MILLER V JOHNSON*

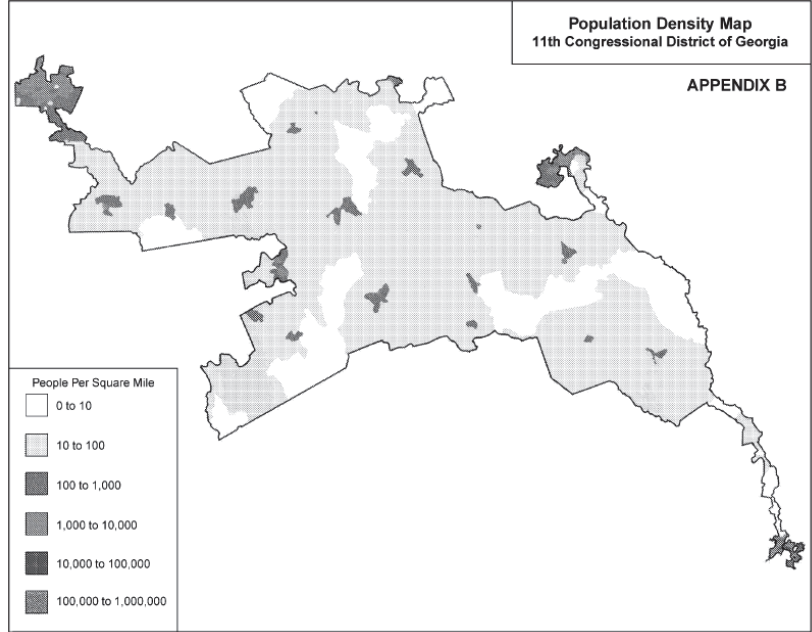
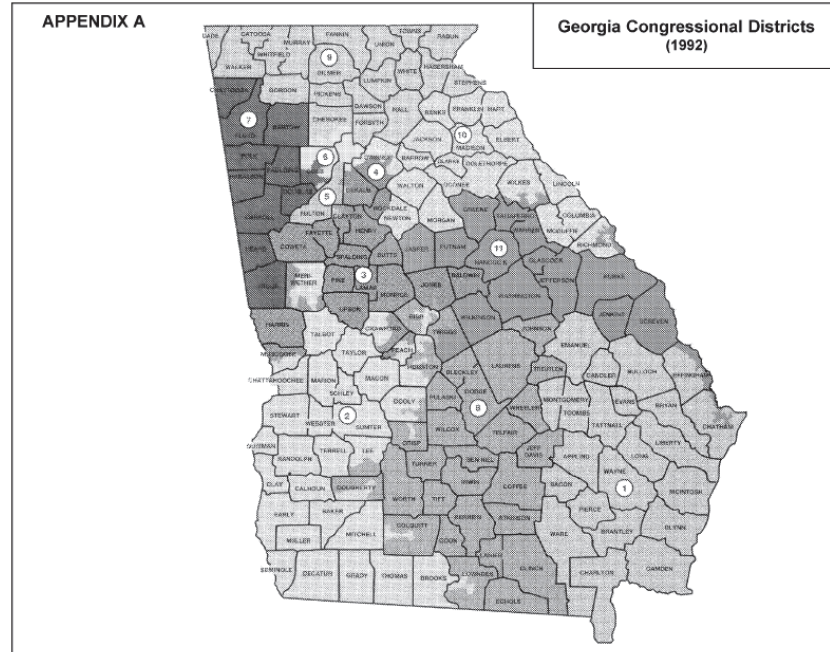




FIGURE 3. MAP OF THE DISTRICT PLAN CHALLENGED IN *MILLER V JOHNSON*



The DOJ had previously approved the district plan at issue in *Johnson* under § 5 of the Voting Rights Act, after commanding that the General Assembly of Georgia adopt a plan with the maximum possible number of majority-black districts.<sup>101</sup> The state defendants accordingly argued that the challenged plan survived strict scrutiny review on the grounds that the plan's adoption furthered Georgia's interest in obtaining the DOJ's approval under § 5.<sup>102</sup> Rejecting the state defendants' argument, the *Johnson* Court decided that compliance with the DOJ's erroneous interpretation of § 5 could not constitute such a compelling interest, because to permit otherwise would "surrender[ ] to

<sup>101</sup> *Id.* at 907–09. Section 5 of the Voting Rights Act requires certain states with a history of discriminatory voting practices to submit proposed changes to their voting laws to the DOJ for approval prior to enactment. See Voting Rights Act of 1965 § 5, 79 Stat at 439, 52 USC § 10304. Until recently, § 4(b) of the Voting Rights Act prescribed the formula that determined whether a given state was subject to § 5's requirements. See Voting Rights Act of 1965 § 4(b), 79 Stat at 438, 52 USC § 10303(b). But in 2013, the Supreme Court struck down the § 4(b) formula as unconstitutional and thus rendered § 5 functionally inoperative. See *Shelby County, Alabama v Holder*, 133 S Ct 2612, 2631 (2013).

<sup>102</sup> See *Johnson*, 515 US at 920–22.

the Executive Branch [the Court's] role in enforcing constitutional limits on race-based official action."<sup>103</sup> Consequently, the Court held that the plan did not survive strict scrutiny and struck it down as an unconstitutional racial gerrymander violative of the Equal Protection Clause.<sup>104</sup>

Importantly, § 5 of the Voting Rights Act differs significantly in scope and involves distinct legal issues as compared to § 2. Section 5 is a mechanism for federal regulation of state voting practices and thereby implicates the proper scope of federal executive power, whereas § 2 establishes a cause of action that private parties can use to directly challenge those practices. As such, the *Johnson* decision has no direct bearing on the question whether compliance with § 2 may ever constitute a compelling interest justifying race-conscious districting.<sup>105</sup> That question therefore remains legally unresolved, even though the Court has had opportunities to address it in several cases. Part II discusses those cases in further detail.

## II. PAST ATTEMPTS TO USE § 2 AS AN AFFIRMATIVE DEFENSE

In response to a number of racial gerrymandering challenges brought in recent decades, states have attempted to defend their district plans on the grounds that they were strategically designed to ensure compliance with § 2 of the Voting Rights Act.<sup>106</sup> The Supreme Court, however, has repeatedly and expressly left unanswered the question whether compliance with § 2 can ever provide states with a successful defense against a racial gerrymandering challenge brought on equal protection grounds. For example, in the racial gerrymandering case *Shaw v Hunt*<sup>107</sup> ("Shaw II"), the majority left the question of the § 2 defense's availability unresolved, writing: "We assume, *arguendo*, for the purpose of resolving this suit, that compliance with § 2

---

<sup>103</sup> Id at 922, citing *United States v Nixon*, 418 US 683, 704 (1974), *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803), *Baker v Carr*, 369 US 186, 211 (1962), and *Cooper v Aaron*, 358 US 1, 18 (1958). Notably, however, four justices later expressed support for the proposition that compliance with the DOJ's interpretation of § 5 could potentially qualify as a compelling state interest in other circumstances. See *LULAC*, 548 US at 518–19 (Scalia concurring in the judgment in part and dissenting in part).

<sup>104</sup> *Johnson*, 515 US at 920–22, 927–28.

<sup>105</sup> See id at 921 (expressly leaving unanswered the question "[w]hether or not in some cases compliance with the [Voting Rights] Act . . . can provide a compelling interest" justifying race-conscious districting).

<sup>106</sup> See, for example, *Bush v Vera*, 517 US 952, 976–77 (1996) (O'Connor) (plurality).

<sup>107</sup> 517 US 899 (1996).

could be a compelling interest.”<sup>108</sup> A total of five justices summed across the plurality and concurring opinions rendered a similar result in the subsequent racial gerrymandering case *Bush v Vera*.<sup>109</sup> In *Vera*, Justice Sandra Day O'Connor wrote on behalf of a three-justice plurality: “[W]e assume without deciding that compliance with the [§ 2] results test . . . can be a compelling state interest.”<sup>110</sup> Likewise, Justice Clarence Thomas stated in a concurring opinion joined by one other justice that he was “willing to assume without deciding that the State [had] asserted a compelling interest.”<sup>111</sup>

When the Court treats a legal proposition as assumed but not decided, that proposition cannot be cited as binding precedent in future cases.<sup>112</sup> Thus, because the Court has expressly carved out the threshold question of the § 2 defense's viability as assumed but undecided, it remains an open question whether the defense can be successfully wielded against an equal protection racial gerrymandering claim. Similarly, whether § 2 can sustain a defense against a vote dilution claim brought under § 2 itself remains unresolved.

This Part begins by discussing the cases in which states have attempted to raise a § 2 defense to claims of racial gerrymandering. It then analyzes the Supreme Court's reasoning in *Bartlett v Strickland*.<sup>113</sup> In that case, the state defendants raised § 2 as a defense not to a racial gerrymandering claim but rather to a claim that a district plan violated state election laws under the state's own constitution.<sup>114</sup> Even though *Strickland* did not itself involve a racial-districting challenge, the Court's analysis in that case illuminates several aspects of the § 2 defense's potential viability.

#### A. Section 2 as a Defense against Equal Protection Claims

In response to racial gerrymandering claims brought under the Equal Protection Clause, state defendants have traditionally

---

<sup>108</sup> Id at 915.

<sup>109</sup> 517 US 952 (1996).

<sup>110</sup> Id at 977 (O'Connor) (plurality).

<sup>111</sup> Id at 1003 (Thomas concurring).

<sup>112</sup> See, for example, *National Aeronautics and Space Administration v Nelson*, 562 US 134, 163 (2011) (Scalia concurring) (explaining that “*stare decisis* is simply irrelevant when the pertinent precedent assumed, without deciding, the existence of a constitutional right”).

<sup>113</sup> 556 US 1 (2009).

<sup>114</sup> Id at 7–8 (Kennedy) (plurality).

focused their litigation resources on attacking the elements of the plaintiffs' prima facie case, denying that race was the "predominant factor" motivating the design of the district plan in question.<sup>115</sup> But in a few cases, states have additionally argued that, to the extent that racial considerations motivated the design of a given district plan, those considerations were necessary to avoid a violation of § 2 and were therefore legally justified. This § 2 defense has surfaced before the United States Supreme Court in *Shaw II* and *Vera*, sister cases that were decided on the same day.<sup>116</sup> In both, the Court expressly declined to address the threshold question of the § 2 defense's viability.<sup>117</sup>

Premised on the same dispute underlying *Shaw I*,<sup>118</sup> *Shaw II* presented the Court with the question whether North Carolina's challenged district plan survived strict scrutiny.<sup>119</sup> The state defendants argued that it did, on the grounds that the plan had been necessary for the state to avoid violating § 2.<sup>120</sup> In evaluating the merits of this defense, the Court began by announcing that it would assume without deciding, "for the purpose of resolving this suit, that compliance with § 2 could be a compelling interest."<sup>121</sup> Operating under this assumption, the Court implicitly adopted the district court's reasoning that § 2—if it could constitute a compelling interest at all—could do so only if the defendants showed that the state would have been in violation of § 2 but for the enactment of the challenged plan.<sup>122</sup> Doctrinally, this placed a burden of proof on the defendants identical to the burden that plaintiffs must bear when making a prima facie showing of a § 2 violation. That is, the state defendants were required to use the *Gingles* preconditions and the totality-of-the-circumstances test to establish that the previous district plan had violated § 2.<sup>123</sup>

On the facts of *Shaw II*, the fatal flaw in the state's argument was that the minority group in the challenged district was

---

<sup>115</sup> See, for example, *Johnson*, 515 US at 916–18; *Alabama Legislative Black Caucus v Alabama*, 2015 WL 1310746, \*7–8 (US).

<sup>116</sup> *Shaw II*, 517 US at 899; *Vera*, 517 US at 952.

<sup>117</sup> *Shaw II*, 517 US at 915; *Vera*, 517 US at 977 (O'Connor) (plurality).

<sup>118</sup> For a discussion of *Shaw I*, see text accompanying notes 84–92.

<sup>119</sup> *Shaw II*, 517 US at 901–02.

<sup>120</sup> See State Appellees' Brief, *Shaw v Hunt*, Docket Nos 94-923, 94-924, \*39–49 (US filed Oct 25, 1995) (available on Westlaw at 1995 WL 632461).

<sup>121</sup> *Shaw II*, 517 US at 915.

<sup>122</sup> See *id.* at 914–18.

<sup>123</sup> See *id.* at 914–16.

not sufficiently “geographically compact.”<sup>124</sup> As a result, the Court reasoned that the district could not have been successfully challenged as resulting in vote dilution under § 2, because no hypothetical plaintiff could have established the first of the three *Gingles* preconditions.<sup>125</sup> In turn, because no plaintiff could have prevailed on a § 2 challenge against the district in question, the state could not assert as a defense that it had “narrowly tailored” that district’s boundaries in furtherance of a “compelling state interest” in avoiding a § 2 violation.<sup>126</sup> Accordingly, the Court concluded that North Carolina’s district plan did not survive strict scrutiny.<sup>127</sup>

In *Vera*, five of the justices again deliberately refrained from deciding whether avoidance of a § 2 violation can ever provide a defense to a claim of racial gerrymandering, explaining that they would “assume without deciding that compliance with the [§ 2] results test . . . can be a compelling state interest” for purposes of strict scrutiny review.<sup>128</sup> As in *Shaw II*, the Court in *Vera* ultimately held that even with the benefit of this assumption, the district plan at issue could not survive strict scrutiny, because the challenged district was not geographically compact as required by the first *Gingles* precondition.<sup>129</sup>

O’Connor also authored a separate concurrence in *Vera* to express her view that compliance with § 2 should qualify as a compelling state interest in at least some cases. She reasoned that “it would be irresponsible for a State to disregard the § 2 results test” in light of the obligations that Congress intended § 2 to impose on the states.<sup>130</sup> Notably, some district courts have latched on to this concurrence as support for the conclusion that compliance with § 2 may justify a *court’s* use of race-conscious principles in crafting remedial district plans following a judicial determination that a state has violated the Voting Rights Act.<sup>131</sup>

---

<sup>124</sup> *Id.* at 916 (quotation marks omitted).

<sup>125</sup> *Shaw II*, 517 US at 916–17. Recall that the first *Gingles* precondition requires a showing that the relevant minority group is sufficiently large and geographically compact to constitute a numerical majority of the citizen voting-age population in a single-member legislative district. See note 33 and accompanying text.

<sup>126</sup> *Shaw II*, 517 US at 916–17.

<sup>127</sup> *Id.* at 902.

<sup>128</sup> *Vera*, 517 US at 977 (O’Connor) (plurality). See also *id.* at 1003 (Thomas concurring).

<sup>129</sup> *Id.* at 978–79 (O’Connor) (plurality). See also *id.* at 1003 (Thomas concurring).

<sup>130</sup> *Id.* at 991–92 (O’Connor concurring).

<sup>131</sup> See *Colleton County Council v McConnell*, 201 F Supp 2d 618, 639–40 (D SC 2002) (three-judge panel); *King v State Board of Elections*, 979 F Supp 619, 621–22 (ND Ill 1997) (three-judge panel).

Most recently, the § 2 defense was raised in the state court case of *Dickson v Rucho*.<sup>132</sup> In that case, the Supreme Court of North Carolina held that § 2 offers state defendants a defense for race-conscious districting.<sup>133</sup> In finding that compliance with § 2 could constitute a compelling state interest for purposes of strict scrutiny review, the court began by observing that “the Voting Rights Act creates tension with the Fourteenth Amendment.”<sup>134</sup> It then proceeded to justify its recognition of the § 2 defense on the grounds that, without the defense’s availability, the state would be unable to lawfully comply with the requirements of the Voting Rights Act.<sup>135</sup> The court also reasoned that the availability of § 2 as a defense makes pragmatic sense because it provides states with expanded opportunities to avoid the potentially heavy costs of districting litigation.<sup>136</sup> Applying the defense to the facts before it, the court found in favor of the state defendants because they had “show[n] a strong basis in evidence that the possibility of a section 2 violation existed” at the time that they had drawn the remedial district plan at issue.<sup>137</sup>

Though O’Connor expressed concerns similar to those raised in *Dickson*, those concerns were unable to convince a majority of the justices in *Vera* to definitively rule on the issue of the § 2 defense’s general availability.<sup>138</sup> As such, whether a state may ever successfully raise a § 2 defense against an equal protection claim

---

<sup>132</sup> 766 SE2d 238 (NC 2014), vacd and remd, 2015 WL 223554 (US) (remanding the case to the Supreme Court of North Carolina for reconsideration in light of *Alabama Legislative Black Caucus*).

<sup>133</sup> *Dickson*, 766 SE2d at 248.

<sup>134</sup> *Id.*

<sup>135</sup> See *id.* (“Because the Supreme Court of the United States and the United States Congress have indicated without ambiguity that they expect States to comply with the Voting Rights Act, state laws passed for the purpose of complying with the Act must be capable of surviving strict scrutiny.”).

<sup>136</sup> *Id.*

<sup>137</sup> *Dickson*, 766 SE2d at 249–52.

<sup>138</sup> It may be that the Court has left the question of § 2 defense’s viability undecided out of a desire to avoid the constitutional issues implicated by the defense. See *Vera*, 517 US at 990–92 (O’Connor concurring) (discussing the tension between the obligations imposed by the Fourteenth Amendment and the Voting Rights Act, and defending the Court’s assumption that compliance with § 2 can constitute a compelling interest on the grounds that “[s]tatutes are presumed constitutional”). For another case in which the Court similarly sought to avoid a decision on an underlying constitutional issue, see *Herrera v Collins*, 506 US 390, 416–17 (1993) (assuming without deciding that “actual innocence” demonstrated post-trial may warrant habeas relief, and thus avoiding a precedential decision on the underlying constitutionality of executing a criminal defendant who has proven such innocence).

remains an open question yet to be resolved by the federal courts.

#### B. Section 2 as a Defense against State Constitutional Claims

While the Supreme Court has not resolved the issue of whether states may use § 2 of the Voting Rights Act as a defense against racial-districting claims, it recently addressed a related question concerning § 2's application as a defense to nonracial state election-law claims. The case in which that question arose, *Bartlett v Strickland*, began as a suit in North Carolina state court against various state officials.<sup>139</sup> The North Carolina General Assembly had drawn the lines of its District 18 in a manner that split Pender County, North Carolina, into two separate state legislative districts.<sup>140</sup> The plaintiffs alleged that this district plan violated the North Carolina Constitution's Whole County Provision, which prohibits the General Assembly "from dividing counties when drawing legislative districts for the State House and Senate."<sup>141</sup>

The state defendants countered that the General Assembly had necessarily split Pender County across two districts to comply with § 2 of the Voting Rights Act.<sup>142</sup> More specifically, the defendants claimed that District 18 had been drawn to ensure that it contained a black voting-age population of 39.36 percent—a percentage high enough "to give African-American voters the potential to join with majority voters to elect the minority group's candidate of its choice"<sup>143</sup> and thus to create a "crossover district."<sup>144</sup> A crossover district (also sometimes termed a "coalitional district"<sup>145</sup>) is a district in which minority voters compose less than 50 percent of the population but are still large enough in number to elect the candidate of their choice with the help of

---

<sup>139</sup> *Strickland*, 556 US at 8 (Kennedy) (plurality).

<sup>140</sup> *Id* at 7–8 (Kennedy) (plurality).

<sup>141</sup> *Id* (Kennedy) (plurality), citing NC Const Art II, §§ 3, 5.

<sup>142</sup> *Strickland*, 556 US at 8 (Kennedy) (plurality).

<sup>143</sup> *Id* (Kennedy) (plurality).

<sup>144</sup> *Id* at 14 (Kennedy) (plurality).

<sup>145</sup> See, for example, Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 NC L Rev 1517, 1539 (2002) (using the term "coalitional districts" to refer to districts in which "the black registered vote population is less than 50% (typically 33%–39%) and the rest of the registered voters are non-Hispanic whites"). Throughout this Comment, the terms "crossover district" and "coalitional district" are used interchangeably.

“crossover” votes from majority voters supporting the same candidate.<sup>146</sup>

Had the General Assembly instead left Pender County whole, District 18 would have had a black voting-age population of only 35.33 percent rather than 39.36 percent—and only the latter percentage was high enough to create a crossover district.<sup>147</sup> The dispute in *Strickland* therefore turned on whether § 2 required state officials to strengthen the influence of minorities’ votes through the creation of crossover districts.<sup>148</sup> If and only if it did, then the state defendants could persuasively wield § 2 as a defense by asserting that § 2 superseded the Whole County Provision in the North Carolina Constitution by virtue of the US Constitution’s Supremacy Clause.<sup>149</sup>

No opinion commanded a majority in *Strickland*, but five justices agreed that § 2 does not require state legislatures to create crossover districts.<sup>150</sup> The North Carolina state officials’ § 2 defense thus necessarily failed, because it relied on the theory that § 2 indeed required the creation of crossover districts.<sup>151</sup> Key to the Court’s rejection of this theory—at least as explained in Justice Anthony Kennedy’s plurality opinion—was the fact that African Americans composed less than 50 percent of the voting-age population in District 18, both as it was actually drawn and as it counterfactually could have been drawn to include the entirety of Pender County.<sup>152</sup> In other words, the Court found that no matter how the General Assembly had drawn its district plan, it would have been impossible for state officials to draw any electoral district covering Pender County that resulted in a black voting-age population of over 50 percent. As such, no conceivable plan could have allowed a hypothetical § 2 plaintiff to show that the black voting-age population was sufficiently large to constitute a majority of a single-member district in the Pender County area—a showing that such a plaintiff would be required to establish in order to make out a prima facie case of

---

<sup>146</sup> See *Strickland*, 556 US at 13 (Kennedy) (plurality).

<sup>147</sup> *Id.* at 14 (Kennedy) (plurality).

<sup>148</sup> *Id.* at 6 (Kennedy) (plurality).

<sup>149</sup> See *id.* at 7 (Kennedy) (plurality). See also US Const Art VI, cl 2 (“[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

<sup>150</sup> *Strickland*, 556 US at 14 (Kennedy) (plurality); *id.* at 26 (Thomas concurring).

<sup>151</sup> See *id.* at 14 (Kennedy) (plurality).

<sup>152</sup> See *id.* (Kennedy) (plurality).



vote dilution under *Gingles*.<sup>153</sup> In turn, no plaintiff could have succeeded in challenging any district covering the Pender County area under § 2, regardless of how the General Assembly had decided to draw its district plan. The state defendants therefore could not credibly contend that the area in Pender County would have been susceptible to a § 2 challenge but for the enactment of the plan at issue.<sup>154</sup> The Court accordingly rejected the state's argument that the plan was necessary to ensure state compliance with § 2.<sup>155</sup>

Although the *Strickland* Court did not address whether states may use § 2 as a defense against federal racial-districting claims, the plurality's reasoning has implications for the application of the § 2 defense against racial gerrymandering and vote dilution challenges. In particular, because § 2 does not require states to create crossover districts, it follows that the § 2 defense cannot succeed if a plaintiff challenges a district whose demographics could have given rise to a crossover district but *not* to a majority-minority district. This is because, after *Strickland*, electoral districts are immune from § 2 liability if they are located in geographic areas where it is demographically impossible for racial minorities to compose 50 percent or more of the voting-age population of any single-member district.<sup>156</sup> As a result, states will never face § 2 liability for districts in these areas. Accordingly, they can never credibly defend race-conscious districting in such areas on the grounds that such districting was necessary to avoid § 2 liability.

Significantly, however, *Strickland* leaves room for states to use § 2 as a basis for creating crossover districts as *alternatives* to majority-minority districts in geographic areas whose demographics give rise to § 2 violations under the standards set forth in *Gingles*. This is because *Strickland* imposes a 50 percent threshold requirement only on the *prima facie* elements of a § 2 violation, not on the adequacy of a state's *remedy* for such a violation.<sup>157</sup> Of course, the extent to which states may safely remedy § 2 violations by creating crossover districts post-*Strickland* must be qualified by the fact that only three justices signed on to

---

<sup>153</sup> See *Gingles*, 478 US at 50–51.

<sup>154</sup> See *Strickland*, 556 US at 14 (Kennedy) (plurality).

<sup>155</sup> *Id.* at 24–25 (Kennedy) (plurality).

<sup>156</sup> See *id.* at 24 (Kennedy) (plurality).

<sup>157</sup> *Id.* at 19–20 (Kennedy) (plurality) (“[A] party asserting § 2 *liability* must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent.”) (emphasis added).

the plurality opinion in that case. Further casting doubt over crossover districts' efficacy is the warning of *Strickland's* principal dissent that the Court's decision interpreted § 2 in a manner that functionally requires states to create majority-minority districts,<sup>158</sup> despite the plurality's protestations that it intended no such thing.<sup>159</sup> It is against this backdrop that any comprehensive analysis of the § 2 defense's potential viability must be considered.

### III. IMPLEMENTING THE § 2 DEFENSE

As discussed in the previous Part, several states have attempted to defend against racial gerrymandering claims by arguing that state officials drew the districts at issue to remedy or avoid a violation of § 2 of the Voting Rights Act.<sup>160</sup> When a state raises this defense, it must demonstrate its counterfactual violation of § 2 by satisfying the *Gingles* preconditions and the totality-of-the-circumstances test—the same doctrinal tools that plaintiffs must use to establish a prima facie case of § 2 vote dilution.<sup>161</sup> However, though some lower courts have recognized the availability of the § 2 defense,<sup>162</sup> the Supreme Court has repeatedly acknowledged but expressly declined to address the question of the defense's legal viability.<sup>163</sup> As a result, state officials have been left to speculate about the answers to a number of legal questions that bear on how states should design district plans: To what extent does § 2 require or allow states to take race into account when drawing districts? If those districts are challenged as either constituting racial gerrymanders or resulting in vote dilution, when will states' attempts to comply with § 2 create a valid affirmative defense for race-conscious districting? And how will courts engage in a legal analysis of such a defense's merits?

---

<sup>158</sup> *Strickland*, 556 US at 27 (Souter dissenting).

<sup>159</sup> See, for example, *id* at 23 (Kennedy) (plurality) (“[Section] 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts. . . . Our holding [ ] should not be interpreted to entrench majority-minority districts by statutory command.”).

<sup>160</sup> See *Shaw II*, 517 US at 914; *Vera*, 517 US at 976 (O'Connor) (plurality); *Dickson*, 766 SE2d at 248.

<sup>161</sup> See *Gingles*, 478 US at 50–51; *Quilter*, 507 US at 157.

<sup>162</sup> See, for example, *Dickson*, 766 SE2d at 252.

<sup>163</sup> See *Shaw II*, 517 US at 915; *Vera*, 517 US at 977 (O'Connor) (plurality). See also *Johnson*, 515 US at 921.

This Part explores and attempts to resolve these questions. Part III.A offers doctrinal support for the § 2 defense's availability against federal claims of unlawful racial districting. Part III.B then describes some key aspects of the § 2 defense's application in practice, drawing on analogies to the Supreme Court's affirmative action cases to situate this analysis within the Court's broader jurisprudence. In light of the ways in which the defense would apply in practice, Part III.C recommends that states make effective use of racial coalitional districts to minimize their risk of liability for unlawful racial districting. Finally, Part III.D concludes by discussing some normative implications of interpreting § 2 in a way that permits limited considerations of race in the redistricting process.

#### A. Establishing a Basis for the § 2 Defense

As Justice Antonin Scalia has pointed out, the recognition of defenses based on the Voting Rights Act may be normatively wise.<sup>164</sup> If courts fail to recognize § 2 as a defense for race-conscious remedial districting, then states in violation of § 2 will inevitably find themselves in an "impossible position,"<sup>165</sup> forced to choose among three undesirable options: leave a violative district plan as is and risk liability under § 2, fix the plan using race-conscious principles but risk violating the Equal Protection Clause, or attempt to fix the plan using a race-neutral approach but risk either failing to remedy the existing violation or creating a new one.<sup>166</sup> The availability of a § 2 defense solves this quandary by providing states with an escape hatch to correct noncompliant districts without simultaneously creating fresh risks of litigation.<sup>167</sup>

In addition to this normative support for the § 2 defense's availability, doctrinal frameworks already exist to support the § 2 defense and to legally justify race-conscious districting. This Section discusses those doctrinal frameworks, first in the

---

<sup>164</sup> See *LULAC*, 548 US at 518 (Scalia concurring in the judgment in part and dissenting in part).

<sup>165</sup> *Id.* (Scalia concurring in the judgment in part and dissenting in part).

<sup>166</sup> A strictly race-neutral approach to remedial districting can leave a state exposed to liability because, under the *Gingles* results test, § 2 liability may attach even if state officials do not actively intend to take race into account when drawing district lines. See text accompanying notes 33–36.

<sup>167</sup> See *Dickson*, 766 SE2d at 248 (advancing the policy argument that the § 2 defense's availability has the potential to reduce states' litigation costs).

context of equal protection racial gerrymandering claims and then in the context of § 2 vote dilution claims.

1. The compelling-interest prong of strict scrutiny review.

To the extent that its past cases have considered how the § 2 defense could fit into existing doctrinal frameworks, the Supreme Court has indicated that whether states may ever use § 2 as a defense—at least against equal protection claims of racial gerrymandering—turns on whether compliance with § 2 constitutes a “compelling interest” for the purposes of strict scrutiny review.<sup>168</sup>

The fact that § 2 is essentially a codification of the Fifteenth Amendment<sup>169</sup> suggests that compliance with § 2 can in fact qualify as a compelling state interest in some circumstances. The Supreme Court has observed that § 2’s purpose is to enforce the right to vote as guaranteed by the Fifteenth Amendment.<sup>170</sup> Furthermore, the similarity between the texts of § 2 and the Fifteenth Amendment suggests the interchangeable nature of the rights they protect: § 2 prohibits “any State or political subdivision” from imposing voting practices that “result[ ] in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color,”<sup>171</sup> and the Fifteenth Amendment likewise provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race [or] color.”<sup>172</sup> As such, to the extent that § 2 operationalizes the principles established by the Fifteenth Amendment, § 2 can be understood as a codification of constitutional rights.

Outside the voting-rights context, the Supreme Court has stated that, for the purposes of strict scrutiny review, government officials may justify race-conscious action if that action is

---

<sup>168</sup> See, for example, *Shaw II*, 517 US at 915 (assuming for the sake of argument that § 2 may be used as a defense and situating the analysis of this defense within the strict scrutiny framework); *Vera*, 517 US at 977 (O’Connor) (plurality) (same).

<sup>169</sup> See notes 20–21 and accompanying text.

<sup>170</sup> See *National Association for the Advancement of Colored People v New York*, 413 US 345, 350 (1973) (“Section 2 . . . clearly indicates that the purpose of the Act is to assist in the effectuation of the Fifteenth Amendment.”). See also *South Carolina v Katzenbach*, 383 US 301, 308 (1966), overruled on other grounds by *Shelby County, Alabama v Holder*, 133 S Ct 2612 (2013) (characterizing the Voting Rights Act as “effectuat[ing] . . . the [Fifteenth Amendment’s] prohibition against racial discrimination in voting”).

<sup>171</sup> 52 USC § 10301(a).

<sup>172</sup> US Const Amend XV, § 1.

undertaken to avert what would otherwise constitute “a prima facie case of a . . . statutory violation.”<sup>173</sup> The Court has further suggested that this justification for race-conscious action is especially robust when the statutory right is closely tied to a constitutional one. For example, the Court has found that race-conscious state action may be lawful if undertaken to avoid disparate impact liability under Title VII of the Civil Rights Act of 1964,<sup>174</sup> which statutorily extends the Fourteenth Amendment’s limitations on race discrimination in employment from the state to the private sector.<sup>175</sup> By analogy to these strict scrutiny precedents, compliance with § 2 may likewise constitute a compelling state interest for the purposes of strict scrutiny review of an alleged racial gerrymander—particularly in light of the close relationship between § 2 and the Fifteenth Amendment.<sup>176</sup>

Some scholars have suggested that, to the extent that compliance with § 2 constitutes a compelling government interest requiring race-conscious districting, the modern Supreme Court may be poised to strike it down as irredeemably at odds with the Equal Protection Clause and therefore unconstitutional.<sup>177</sup> Yet several signals from the modern Court indicate that a majority of the justices would not necessarily be so inclined. First, a reading of § 2 that places a wholesale prohibition on race-conscious remedial districting would run counter to precedents in which

---

<sup>173</sup> *City of Richmond v J.A. Croson Co.*, 488 US 469, 493–500 (1989).

<sup>174</sup> Pub L No 88-352, 78 Stat 253, codified at 42 USC § 2000e et seq.

<sup>175</sup> Civil Rights Act of 1964 §§ 701(b), 703(a), Pub L No 88-352, 78 Stat at 253–55, codified at 42 USC §§ 2000e(b), 2000e-2(a); *Ricci v DeStefano*, 557 US 557, 580–84 (2009). A testament to this relationship between Title VII and the Fourteenth Amendment is that employment discrimination plaintiffs often bring claims against public employers under both laws concurrently. See, for example, *id.* at 563; *Local Number 93, International Association of Firefighters, AFL-CIO C.L.C. v City of Cleveland*, 478 US 501, 504–05 (1986) (describing a complaint filed by minority firefighters claiming that the City of Cleveland had violated both Title VII and the Fourteenth Amendment).

<sup>176</sup> This conclusion finds support from at least two of the justices who were seated on the Court when *Shaw II* and *Vera* were decided. See *Vieth v Jubelirer*, 541 US 267, 351 (2004) (Souter dissenting) (speculating that a state defendant in an equal protection partisan gerrymandering case could argue that a given district plan was justified under § 2 by “the need to avoid racial vote dilution”); *Vera*, 517 US at 990–92 (O’Connor concurring) (using the legislative history of the Voting Rights Act to argue that compliance with § 2 could be a compelling state interest).

<sup>177</sup> See, for example, Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 Duke J Const L & Pub Pol 125, 142–43 (2010). The suggestion that the Court may be prepared to strike down § 2 has also been made in the popular press. See, for example, Jeffrey Rosen, *Eric Holder’s Suit against Texas Gives the Supreme Court a Chance to Gut Even More of the Voting Rights Act* (The New Republic, Sept 1, 2013), archived at <http://perma.cc/H8K5-JMVV>.

the Court has elsewhere tolerated limited state reliance on racial classifications, such as in the Title VII context and in cases involving affirmative action in university-admissions programs.<sup>178</sup>

Second, and perhaps more importantly, four of the currently seated justices agreed in *LULAC* that compliance with § 5 of the Voting Rights Act could be a compelling state interest, despite its potential tension with the Equal Protection Clause.<sup>179</sup> Significantly, the justices who endorsed this view were Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito—a somewhat surprising assortment, given some scholars’ views that these justices are the most politically conservative members of today’s Court and would be more inclined than the other justices to strike down § 2 as unconstitutional.<sup>180</sup> These four justices reasoned that “[i]f compliance with § 5 were not a compelling state interest, then a State could be placed in the impossible position of having to choose between compliance with § 5 and compliance with the Equal Protection Clause.”<sup>181</sup> Insofar as this logic extends to the § 2 context, *LULAC* suggests that this same group of justices would be willing to join their colleagues in upholding an interpretation of § 2 that leaves room for race-conscious state action, contrary to speculations in the academic literature.

## 2. The totality-of-the-circumstances test in vote dilution analysis.

As discussed in the previous Section, an analogy to the Supreme Court’s strict scrutiny cases outside the § 2 context indicates that a doctrinal basis exists for states’ use of the § 2 defense against racial gerrymandering claims. This analogy,

---

<sup>178</sup> See, for example, *Ricci*, 557 US at 580–84; *Fisher v University of Texas at Austin*, 133 S Ct 2411, 2419 (2013) (holding not that race-conscious admissions processes are per se violations of the Equal Protection Clause but rather that courts must apply strict scrutiny in evaluating the constitutionality of affirmative action measures in university admissions).

<sup>179</sup> *LULAC*, 548 US at 518 (Scalia concurring in the judgment in part and dissenting in part), citing *Shaw II*, 517 US at 909, and *J.A. Croson*, 488 US at 498–506 (concluding that “compliance with § 5 of the Voting Rights Act can be [a compelling state] interest” on the grounds that “race may be used where necessary to remedy identified past discrimination”).

<sup>180</sup> See, for example, Fuentes-Rohwer, 5 Duke J Const L & Pub Pol at 142–43 (cited in note 177).

<sup>181</sup> *LULAC*, 548 US at 518 (Scalia concurring in the judgment in part and dissenting in part).

however, speaks only to the viability of the defense as a shield against equal protection challenges. It does not bear directly on the defense's viability as a shield against claims of § 2 vote dilution, because a prima facie showing of vote dilution under § 2—unlike a prima facie showing of an equal protection violation—does not trigger strict scrutiny analysis.<sup>182</sup>

Nevertheless, a doctrinal basis for the § 2 defense exists in the vote dilution context as well: a court could situate a § 2 defense raised against a § 2 vote dilution claim within the broad, fact-intensive totality-of-the-circumstances test that follows a plaintiff's showing of the three *Gingles* preconditions.<sup>183</sup> Remedial race-conscious districting reasonably falls among the considerations pertaining to the “history of voting-related discrimination” in a given geographic region, which the Senate Judiciary Committee expressly enumerated as a factor relevant to the totality-of-the-circumstances inquiry.<sup>184</sup> And even without this clue from legislative history, the totality-of-the-circumstances test—one of the most capacious legal standards in the judicial compendium—is sufficiently wide reaching to account for the extent to which a state's districting choices are motivated by a need to comply with § 2.

On this account, courts would not need to invent a wholly new doctrinal framework to recognize the viability of the § 2 defense in the context of vote dilution cases. In fact, in both racial gerrymandering and vote dilution cases, courts could economize on existing doctrinal structures by adapting the § 2 defense to strict scrutiny analysis or to the totality-of-the-circumstances inquiry, respectively. The ready availability of these doctrinal frameworks thus offers a sound legal basis for judicial recognition of the § 2 defense.

## B. Applying the § 2 Defense

After identifying the doctrinal forms that the § 2 defense may take, there remain questions as to how courts might actually evaluate the merits of the § 2 defense and under what circumstances the § 2 defense should prevail. As with the previous Section's discussion of the doctrinal basis for the § 2 defense, a discussion of these questions can be bifurcated into separate

---

<sup>182</sup> See Part I.B.2.

<sup>183</sup> See, for example, *Quilter*, 507 US at 157; *De Grandy*, 512 US at 1012.

<sup>184</sup> *Gingles*, 478 US at 44–45, citing S Rep 97-417 at 28–29 (cited in note 27).

analyses: one that examines the defense's application against claims of racial gerrymandering brought under the Equal Protection Clause, and one that examines the defense's application against claims of vote dilution premised on § 2 itself.

1. The § 2 defense vis-à-vis the Equal Protection Clause.

To use § 2 as a defense against a racial gerrymandering claim brought under the Equal Protection Clause, a state must show that (1) it had a compelling interest in avoiding a § 2 violation and (2) the challenged district was narrowly tailored to further that interest.<sup>185</sup> This doctrinal scheme follows from the Supreme Court's apparent assumption that if § 2 offers a defense to racial gerrymandering claims, then the merits of that defense are properly analyzed within the framework traditionally used for strict scrutiny review of state practices classifying citizens on the basis of race.<sup>186</sup> To pass muster with respect to the first component of strict scrutiny review, a state raising the § 2 defense must therefore show, using the three *Gingles* preconditions and the totality-of-the-circumstances test, that the district plan in place prior to the new, allegedly unconstitutional plan would have violated § 2.<sup>187</sup> Absent this counterfactual § 2 violation, a state cannot credibly claim to have acted out of an interest in avoiding such a violation. Likewise, to satisfy the second, narrow-tailoring prong of strict scrutiny review, a state must demonstrate that alternative redistricting plans would have been insufficient to avoid a § 2 violation.<sup>188</sup>

Whether a § 2 violation would have occurred but for the particular design of a challenged district plan is a question of law that courts should decide with no deference to a state legislature's ex ante assessment of its risk of § 2 liability. From a pragmatic standpoint, such a nondeferential approach to the § 2 defense may help courts identify district plans that are crafted not out of good-faith attempts to comply with § 2 but instead out of an intent to racially discriminate or otherwise unjustifiably

---

<sup>185</sup> See text accompanying notes 168–76.

<sup>186</sup> See *Johnson*, 515 US at 915; *Shaw I*, 509 US at 643; *Hunt v Cromartie*, 526 US 541, 546 (1999).

<sup>187</sup> See *Shaw II*, 517 US at 914–18. See also text accompanying notes 122–23.

<sup>188</sup> See *Shaw II*, 517 US at 917–18 (impliedly rejecting the proposition that a race-conscious remedial district plan can be “narrowly tailored” to correct a § 2 violation when an alternative plan would have more effectively “address[ed] the [state’s] professed interest of relieving [ ] vote dilution”).



rely on racial classifications. A nondeferential approach to evaluating the § 2 defense thus strikes a workable compromise for judicial review of state redistricting: it recognizes states' need to have the defense available but simultaneously cabins states' ability to use the defense as an excuse for an unduly expansive reliance on race.

The legal underpinnings for a nondeferential approach to evaluating the *Gingles* preconditions and the totality-of-the-circumstances test find support in the approach that the Supreme Court has taken in affirmative action cases involving university admissions. An analogy to this chapter of the Court's affirmative action jurisprudence is apposite for several reasons.<sup>189</sup> First, § 2 compliance and university affirmative action measures share common means and goals: both types of government action involve race-conscious decisionmaking on the part of state actors for the purpose of decreasing the degree of racial polarization within a community. Second, affirmative action cases, like racial gerrymandering cases, often involve claims that are premised on the Equal Protection Clause and that trigger strict scrutiny review. Thus, they compare instructively to the voting-rights context. For example, two of the Court's modern affirmative action cases—*Fisher v University of Texas at Austin*<sup>190</sup> and *Grutter v Bollinger*<sup>191</sup>—were equal protection cases brought by white plaintiffs who sought to dismantle affirmative action admission policies at higher education institutions.<sup>192</sup> Both cases also reached the stage of strict scrutiny analysis.<sup>193</sup> Given these shared characteristics, the Court's affirmative action cases shed light on which government interests may be deemed sufficiently compelling to justify race-conscious state policies, including race-conscious legislative districting.<sup>194</sup>

---

<sup>189</sup> Notably, one of the judges in *Dickson* drew on precisely this analogy. See *Dickson*, 766 SE2d at 265 (Beasley concurring in part and dissenting in part), citing *Fisher*, 133 S Ct at 2419–20 (drawing on affirmative action cases involving university admissions to suggest a framework for strict scrutiny review of district plans designed on the basis of racial considerations). For an example of this analogy as made in the academic literature, see Fuentes-Rohwer, 5 Duke J Const L & Pub Pol at 152 (cited in note 177) (briefly comparing states' attempts at § 2 compliance with race-based affirmative action).

<sup>190</sup> 133 S Ct 2411 (2013).

<sup>191</sup> 539 US 306 (2003).

<sup>192</sup> *Fisher*, 133 S Ct at 2415; *Grutter*, 539 US at 316–17.

<sup>193</sup> *Fisher*, 133 S Ct at 2419–22; *Grutter*, 539 US at 326–27.

<sup>194</sup> For another modern Supreme Court case addressing the constitutionality of race-based affirmative action in university admissions, see generally *Gratz v Bollinger*, 539 US 244 (2003). Note that the Court's discussion in *Gratz*, unlike in *Fisher* and *Grutter*,

Support for a nondeferential approach to the § 2 defense can be parsed from a careful reading of these affirmative action cases, even though *Fisher* and *Grutter* send mixed signals about how much deference is due when state officials assert that a race-conscious action was narrowly tailored to further a compelling interest. On the one hand, in *Fisher* the Court stated in no uncertain terms that a state university “receives no deference” on the question whether a race-based affirmative action program has been narrowly tailored to the university’s stated “goal of diversity.”<sup>195</sup> On the other hand, the Court in *Grutter* held that a public law school should be accorded some “degree of deference” on the threshold question whether a goal of diversity can constitute a compelling state interest at all.<sup>196</sup> Accordingly, a principled reading of *Fisher* and *Grutter* suggests that the amount of deference owed to state actors varies between the two prongs of strict scrutiny analysis, with no deference given on the narrow-tailoring prong but some deference given on the compelling-interest prong.<sup>197</sup> If this interpretation were directly applied to the § 2 context, then courts would give state defendants no deference on the question whether the state’s remedial plan was narrowly tailored to cure a § 2 violation, but courts would afford some deference on the question whether the state would have been in violation of § 2 but for the remedial plan.

There are several reasons, however, why a court assessing the merits of a § 2 defense in racial gerrymandering cases should reject such an approach and instead apply a nondeferential standard to both prongs of the strict scrutiny analysis. As an initial matter, whether a state is in violation of § 2 is inherently a question of law requiring the application of legal doctrine to resolve, unlike the question whether a given university can offer its students a better education by promoting diversity on

---

neither delves deeply into the compelling-interest prong of strict scrutiny review nor speaks to the amount of deference that courts should give to state actors when engaging in such review. *Id.* at 268–75.

<sup>195</sup> *Fisher*, 133 S Ct at 2419–20.

<sup>196</sup> *Grutter*, 539 US at 328. See also *id.* (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”).

<sup>197</sup> For other scholars’ and practitioners’ accounts of the tiered system of deference emerging from these cases, see, for example, Yifan (Yvonne) C. Everett and Sarah Hampton Cheatham, *Affirmative Action in Education*, 15 *Georgetown J Gender & L* 219, 232–36 (2014); Scott Warner, Pete Land, and Kendra Berner, *The U.S. Supreme Court’s Decision in Fisher v. University of Texas at Austin: What It Tells Us (and Doesn’t Tell Us) about the Consideration of Race in College and University Admissions and Other Contexts*, 60 *Fed Law* 48, 50–51, 54–55 (2013).

campus.<sup>198</sup> *Grutter* can therefore be distinguished as inapplicable to the § 2 context because it involved an asserted compelling interest—the goal of increased diversity—that fundamentally differs from the compelling interest that a state must assert when raising the § 2 defense. Put differently, the logic supporting *Grutter*'s semideferential approach relates to the fact that universities are better positioned institutionally than courts are to evaluate student life on campus and to ascertain whether increased diversity would contribute positively to education.<sup>199</sup> The opposite is true in the racial-districting context: given a set of relevant demographic facts, courts occupy an institutional role and possess legal authority that state actors do not share to adjudicate whether a challenged district plan unlawfully dilutes votes *as a threshold question of law* under *Gingles*—a doctrinal determination that is pivotal to the § 2 defense's availability in any given case.<sup>200</sup> Thus, a primary justification for the use of deference in affirmative action cases like *Grutter* is wholly absent from the § 2 context.

Moreover, the Court in *Fisher* later expressed some ambivalence about the *Grutter* Court's semideferential approach. After discussing the deference that *Grutter* accorded to universities on the compelling-interest prong of strict scrutiny analysis, the *Fisher* Court noted the disagreement among the justices on this

---

<sup>198</sup> For a point of comparison, see *Johnson*, 515 US at 922–23, citing *United States v Nixon*, 418 US 683, 704 (1974), *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803), *Baker v Carr*, 369 US 186, 211 (1962), and *Cooper v Aaron*, 358 US 1, 18 (1958) (applying separation of powers principles to conclude that it is the province of the courts—to the exclusion of other government actors—to decide as a matter of law whether a state is in violation of § 5 of the Voting Rights Act for the purpose of assessing the merits of a § 5 defense). For a more complete discussion of *Johnson*, see text accompanying notes 95–105.

<sup>199</sup> See *Fisher*, 133 S Ct at 2419, citing *Grutter*, 539 US at 328, 330 (“[A] university’s educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . [T]he decision to pursue the educational benefits that flow from student body diversity . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper.”) (quotation marks omitted).

<sup>200</sup> See *Johnson*, 515 US at 922–23. Notably, current events offer examples of local officials involved in redistricting disputes who have expressly acknowledged this disparity in institutional competencies and have accordingly declined to make definitive statements on the merits of potential § 2 vote dilution claims (or their state law equivalents). See, for example, Erin Gurewitz, *Santa Barbara Exploring Voting Changes* (The Daily Nexus, Mar 3, 2015), archived at <http://perma.cc/ES2U-YYER> (discussing a recent settlement in a vote dilution case arising over an alleged violation of the California Voting Rights Act in Santa Barbara, California, and reporting a Santa Barbara city attorney’s statement that “a definitive conclusion on whether or not there was vote dilution [in the challenged districts] can only be reached after trial”).

issue.<sup>201</sup> Further, while it did not overrule this vestige of *Grutter*, a majority of the justices in *Fisher* strongly implied that they would have been willing to do so had the parties requested such an overruling.<sup>202</sup> The justices' apparent lack of commitment to this aspect of *Grutter* thus suggests that limiting *Grutter* to its facts, instead of transferring its deferential standard to the § 2 context, would be reasonably consistent with recent trends in the Court's racial-equal protection jurisprudence.

To illustrate the practical consequences that this nondeferential approach would have, consider the approach taken by the Supreme Court of North Carolina in *Dickson*.<sup>203</sup> In that case, the court found merit in the state officials' § 2 defense on the grounds that "the General Assembly identified past or present discrimination with sufficient specificity to justify the creation of [Voting Rights Act] districts in order to avoid section 2 liability" and that "the General Assembly, before making its redistricting decisions, had a strong basis in evidence on which to reach a conclusion that race-based remedial action was necessary."<sup>204</sup> The court, however, never engaged in its own analysis of the evidentiary record to determine whether the state defendants had in fact been in violation of § 2. Instead, the court merely listed the reports, law review articles, and academic studies that the defendants had offered the trial court in support of their § 2 defense.<sup>205</sup> "[A]ffording near-absolute deference to the General Assembly,"<sup>206</sup> the court then summarily concluded that this

---

<sup>201</sup> *Fisher*, 133 S Ct at 2419. The fractured opinion in *Grutter* itself evinces this long-standing disagreement: Thomas's separate opinion in that case directly contradicts the majority and maintains that universities should be given no deference on the compelling-interest prong of strict scrutiny analysis. *Grutter*, 539 US at 362–64 (Thomas concurring in part and dissenting in part).

<sup>202</sup> *Fisher*, 133 S Ct at 2419 ("There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity. But the parties here do not ask the Court to revisit that aspect of *Grutter*'s holding.") (citations omitted).

<sup>203</sup> For a discussion of *Dickson*, see text accompanying notes 132–37.

<sup>204</sup> *Dickson*, 766 SE2d at 252.

<sup>205</sup> *Id* at 250–52.

<sup>206</sup> Brief of Election Law Professors as Amici Curiae Supporting Petitioners, *Dickson v Rucho*, Docket No 14-839, \*2 (US filed Feb 17, 2015) (available on Westlaw at 2015 WL 678181) ("Professors' Amicus Brief"). This amicus brief was filed in support of a petition for a writ of certiorari filed by the plaintiffs in *Dickson*. See generally Petition for Writ of Certiorari, *Dickson v Rucho*, No 14-839 (US filed Jan 16, 2015). As detailed in note 132, the United States Supreme Court granted the petition but then remanded the case in April 2015 to the Supreme Court of North Carolina for reconsideration in light of *Alabama Legislative Black Caucus v Alabama*, 2015 WL 1310746 (US). *Dickson v Rucho*, 2015 WL 223554 (US).

documentary corpus sufficed to meet its strong-basis-in-evidence standard.<sup>207</sup>

Thus, while the *Dickson* court correctly recognized the availability of the § 2 defense, a careful reading of the United States Supreme Court's strict scrutiny jurisprudence indicates that the *Dickson* court adopted an erroneous approach to analyzing the defense's merits by according undue deference to state actors. If the court had instead applied the correct, nondeferential approach to its analysis of the § 2 defense, it would have reviewed the record before it more rigorously and engaged with the *Gingles* preconditions to determine for itself whether the state would have been in violation of § 2 but for the district plan at issue. This type of searching, nondeferential approach would help to more effectively screen out race-based district plans that cannot be justified by concrete § 2 concerns—precisely the types of district plans that have most concerned commentators critical of the *Dickson* decision.<sup>208</sup>

The doctrinal mechanics of this nondeferential approach, however, are intrinsically framed within strict scrutiny analysis and thus apply to the merits of the § 2 defense only when raised against equal protection claims of racial gerrymandering. In contrast, the next Section considers the defense's application when raised against § 2 vote dilution claims.

## 2. The § 2 defense vis-à-vis § 2 itself.

Separate from an analysis of the § 2 defense's application against racial gerrymandering claims is the question of the defense's ability to succeed against vote dilution claims brought under § 2 itself—a question that no litigant has yet raised in court. This potential application of the § 2 defense is worthy of consideration because the defense could theoretically arise whenever one minority group claims that its members' votes are diluted by a district plan that was designed to protect the voting power of a second minority group.

Outside the courtroom, minority voters in some neighborhoods have indeed raised such claims. Consider, for example, Illinois's current Congressional District 4, a majority-minority district

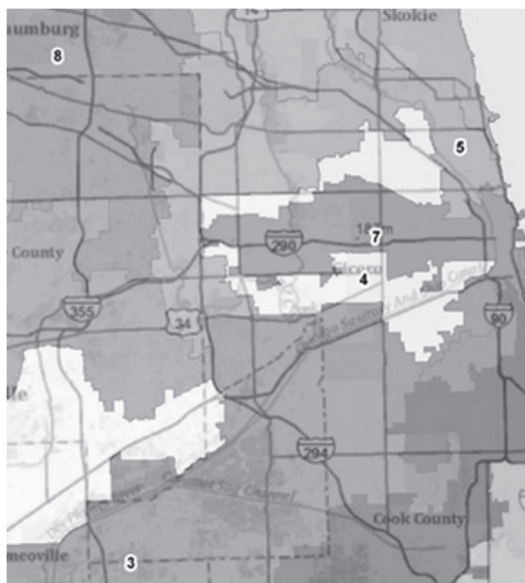
---

<sup>207</sup> *Dickson*, 766 SE2d at 252.

<sup>208</sup> See Professors' Amicus Brief at \*13–14 (cited in note 206).

designed to avoid the dilution of Latino votes under § 2.<sup>209</sup> A map of District 4 and its surrounding districts are depicted below in Figure 3.<sup>210</sup> District 4, appearing in the center of the map, wraps almost entirely around District 7 and has an “odd shape” that “resemble[s] a set of earmuffs.”<sup>211</sup>

FIGURE 4. 2011 CONGRESSIONAL DISTRICTS NEAR CHICAGO, ILLINOIS



District 4 fragments Chicago’s Chinatown neighborhood, and some organizations have consequently objected to the district on the grounds that it dilutes Asian American votes in violation of § 2.<sup>212</sup> If voters were to challenge District 4 on this ground, the state of Illinois could conceivably attempt to use § 2 to defend that the design of District 4 was necessary to avoid the dilution of Latino votes. In such a case, a court would be faced

<sup>209</sup> See *Committee for a Fair and Balanced Map v Illinois State Board of Elections*, 835 F Supp 2d 563, 591–92 (ND Ill 2011) (three-judge panel) (reporting that the Illinois General Assembly decided to maintain District 4 as a majority-minority Latino district after receiving expert advice that such a district would be necessary for the state “to protect itself from suit” under § 2).

<sup>210</sup> For an original copy of the map shown in Figure 3, see *id.* at 596.

<sup>211</sup> John Kanaly, *Gutierrez’s Earmuff-Shaped District Creates Uncompetitive Race* (Medill Reports, Oct 18, 2012), archived at <http://perma.cc/C6BL-FN8A>.

<sup>212</sup> See Aricka Flowers, *Minority Groups: Illinois Redistricting Maps “Unfair”* (Progress Illinois, May 31, 2011), archived at <http://perma.cc/7YYW-QRQX>.

with the yet-unanswered question whether § 2 may be raised as a defense to § 2 vote dilution claims.

Given the doctrinal basis for raising the § 2 defense against § 2 claims,<sup>213</sup> the defense would affect a vote dilution case's outcome only if the case involved demographics that allowed both the plaintiff and the state to establish the three *Gingles* preconditions with regard to both the challenged and counterfactual district plans, respectively.<sup>214</sup> However, in that same subset of cases, each party's establishment of the *Gingles* preconditions would create a doctrinal stalemate such that a court's analysis of the § 2 defense's merits would necessarily devolve into an unstructured evaluation of § 2's totality-of-the-circumstances test. In other words, a court's ultimate determination of which minority group would be entitled to command a citizen voting-age majority in a contested district would turn solely on historical, sociological, and political information bearing on which of the two groups had been more negatively affected by racial discrimination overall under the fact-intensive totality-of-the-circumstances inquiry.<sup>215</sup>

This application of the § 2 defense engenders two complications, each lending itself to divergent implications for the § 2 defense's viability against § 2 vote dilution claims. The first complication is administrative: In the case of a conflict between two groups that have both historically been considered minorities in the United States, it may be far from clear—both for states hoping to avoid legal disputes and for the courts charged with resolving them—which conclusions a court should draw from § 2's totality-of-the-circumstances test. For example, consider the facts of *De Grandy*.<sup>216</sup> In that case, black and Hispanic voters both alleged that a Florida district plan had diluted their votes in violation of § 2.<sup>217</sup> Although the lower court in *De Grandy* found that both sets of plaintiffs had independently established prima facie cases of § 2 liability, it nevertheless upheld

---

<sup>213</sup> See text accompanying notes 183–84.

<sup>214</sup> See text accompanying note 187.

<sup>215</sup> See notes 37–38 and accompanying text (discussing the factors that bear on the totality-of-the-circumstances test under § 2). Note that this doctrinal equipoise does not occur when § 2 is raised as a defense against an equal protection racial gerrymandering claim, because such a case inherently lacks the doctrinal symmetries that would characterize a case in which the § 2 defense were raised against a § 2 vote dilution claim.

<sup>216</sup> For a more complete discussion of the Supreme Court's decision in *De Grandy*, see text accompanying notes 49–55.

<sup>217</sup> *De Grandy*, 512 US at 1000–02.

the district plan at issue, deferring to the state's enactment of the plan on the grounds that it was impossible to fashion a remedy accommodating the interests of both minority groups.<sup>218</sup> If confronted with competing vote dilution claims in a case in which a meritorious § 2 defense were raised against a § 2 claim, a court leaning in the direction of the *De Grandy* district court's approach might find in favor of the state defendants, deferring to the status quo given the lack of a superior alternative.

The second complication is jurisprudential: In *LULAC*, the Supreme Court indicated that § 2 should not be interpreted to allow a state to remedy the dilution of one minority group's votes at the expense of another's<sup>219</sup>—an interpretation that would necessarily be implicit in judicial recognition of the ultimate merits of a § 2 defense. Given this concern, for the subset of vote dilution cases in which the § 2 defense's availability would potentially be outcome determinative, a court might be unwilling to entertain the § 2 defense at all—even if the same court were willing to recognize the defense when raised in response to equal protection racial gerrymandering claims.

A thought experiment on a court's potential resolution of the vote dilution issues implicated by Illinois's Congressional District 4 illustrates the tension between these competing administrative and jurisprudential concerns: Imagine that a group of Asian Americans files a § 2 complaint in federal district court against Illinois state officials. Imagine further that the officials defend District 4 by arguing that its creation was necessary to avoid diluting Latino votes under § 2, and the district court finds merit in both the § 2 claim and the § 2 defense. How would the court resolve the case? On the one hand, the court might follow the approach taken by the district court in *De Grandy*, deferring to the status quo and effectively relying on the merits of Illinois's § 2 defense to uphold District 4. On the other hand, the court might find grounds for refusing to consider the § 2 defense's merits altogether, or for otherwise choosing to strike down District 4. For example, the court might rely on *LULAC* as a basis for declining to recognize the § 2 defense

---

<sup>218</sup> *Id.* at 1004 (“The [district court’s] findings of vote dilution in the senatorial districts had no practical effect . . . because the court held that remedies for the blacks and the Hispanics were mutually exclusive.”). See also *De Grandy v Wetherell*, 815 F Supp 1550, 1580 (ND Fla 1992), *affd in part and revd in part*, *De Grandy*, 512 US 997.

<sup>219</sup> *LULAC*, 548 US at 429, citing *Shaw II*, 517 US at 917. See also *Shaw II*, 517 US at 917 (“The vote dilution injuries suffered by [African American § 2 plaintiffs] are not remedied by creating a safe majority-black district somewhere else in the State.”).



against a § 2 claim, pointing to this precedent for the proposition that state actors cannot lawfully “make up for the less-than-equal opportunity of some individuals by providing greater opportunity to others.”<sup>220</sup> Likewise, even a court otherwise inclined to follow the *De Grandy* approach might nevertheless strike down District 4 if it concluded that Illinois could have instead designed a plan that accommodated both minority groups (such as a plan that included one majority-minority district for Latinos and a separate majority-minority district for Asian Americans).

As this example illustrates, the Court’s vote dilution precedents are mired with contradictory implications for the viability of the § 2 defense against § 2 claims. At least in this context, then, the defense’s fate remains uncertain. Ultimately, whether courts would be willing to recognize the § 2 defense as raised against § 2 vote dilution claims—as well as how courts would apply the defense in cases in which the totality-of-the-circumstances test failed to yield clear results—is a question that remains too far on the horizon of future case law to presently be ripe for resolution.

### C. Developing a Districting Strategy in Light of the § 2 Defense

Given the above account of how the § 2 defense might operate in practice, how could a state seeking to avoid a § 2 violation design its district plan in a way that would avoid liability under both § 2 and the Equal Protection Clause? Under one reading of *Gingles*, a state might attempt to avoid § 2 liability by intentionally creating majority-minority districts.<sup>221</sup> If consequently sued under the Equal Protection Clause for intentionally taking race into account in remedial districting, the state could then use § 2 as an affirmative defense, arguing that the plan was narrowly tailored to further the state’s compelling interest in avoiding a § 2 violation.<sup>222</sup>

---

<sup>220</sup> *LULAC*, 548 US at 429 (citation omitted).

<sup>221</sup> See, for example, *Vera*, 517 US at 993 (O’Connor concurring) (postulating that § 2 “may require a State to create a majority-minority district where the three *Gingles* factors are present”); Fuentes-Rohwer, 5 Duke J Const L & Pub Pol at 151 (cited in note 177) (noting that the Voting Rights Act may be “deployed in furtherance of majority-minority districts”).

<sup>222</sup> See text accompanying notes 185–87.

However, if sued under § 2 itself for drawing a plan that resulted in vote dilution, the § 2 defense might be unavailable to offer the state a safe haven from liability. In particular, the defense's availability will depend on the court's willingness to consider the defense in the context of § 2 vote dilution cases.<sup>223</sup> As such, the creation of majority-minority districts may not be an entirely foolproof means of remedying a district plan that violates § 2. Furthermore, some scholars have expressed a concern that, to the extent that states rely on an interpretation of § 2 that mandates the creation of majority-minority districts, the current Supreme Court may be poised to strike down § 2 as irredeemably at odds with the Fourteenth Amendment and therefore unconstitutional.<sup>224</sup>

Instead, states can avoid and remedy § 2 violations by creating coalitional districts in which "minority voters make up less than a majority of the voting-age population" but are still large enough in number to "elect the candidate[s] of [their] choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate."<sup>225</sup> The critical feature of coalitional districts is that they can protect a state from liability under § 2 by entirely precluding plaintiffs from establishing a prima facie case of vote dilution. This is because plaintiffs who challenge coalitional districts as resulting in vote dilution will be systematically unable to establish the third *Gingles* precondition, which requires plaintiffs to show that the majority group in a given geographic region votes as a bloc to defeat the minority group's preferred candidate.<sup>226</sup> In other words, although § 2 does not formally require states to draw coalitional

---

<sup>223</sup> See text accompanying notes 216–20.

<sup>224</sup> See Fuentes-Rohwer, 5 Duke J Const L & Pub Pol at 142–43 (cited in note 177); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv L Rev 1663, 1735–36 (2001).

<sup>225</sup> *Strickland*, 556 US at 13 (Kennedy) (plurality). Of course, from a pragmatic standpoint, whether it is logistically possible for a state to create coalitional districts may be limited by the extent to which voting is racially polarized in the relevant geographic area. See Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 Harv L Rev 2208, 2224–25 (2003) (explaining that a legislature's ability to create coalitional districts depends on "polarized voting [ ] declin[ing] to the point that minority voters have an 'equal opportunity' to elect their preferred candidates in coalitional districts"). Empirical evidence suggests that racially polarized voting is indeed declining and that the creation of coalitional districts is therefore becoming increasingly possible. See Pildes, 80 NC L Rev at 1529 (cited in note 145) ("[W]hile voting continues to show some degree of racial polarization, the degree of polarization nonetheless permits a meaningful level of white-black coalitional politics.").

<sup>226</sup> See *Gingles*, 478 US at 50–51.

districts,<sup>227</sup> the creation of coalitional districts is an effective strategy for foreclosing the risk of § 2 liability altogether.

A race-conscious districting strategy focused on the creation of coalitional districts would stave off the risk of equal protection liability as well. First, though a state must consider race in the course of creating a racially integrated coalitional district, it may be able to block plaintiffs from establishing a *prima facie* racial gerrymandering claim by arguing that voters' cross racial political affiliations—*not* race itself—predominantly informed a challenged coalitional district's design.<sup>228</sup> Equal protection precedents show that courts are indeed willing to dismiss claims alleging racial gerrymandering if a state defendant can show that political rather than racial considerations predominated a challenged district's design, even when racial considerations entered into the design's calculus.<sup>229</sup> Second, even if a court were to allow a plaintiff's *prima facie* equal protection claim to stand, a state defendant could still attempt to avoid an adverse judgment by availing itself of the § 2 defense.<sup>230</sup> In this way, the creation of coalitional districts constitutes a workable reconciliation of the otherwise-conflicting obligations that § 2 and the Equal Protection Clause impose on state governments.

Moreover, the creation of coalitional districts to avoid § 2 violations is an approach that seven justices strongly endorsed in *Strickland*, an otherwise highly fractured decision. Writing for the plurality, for example, Justice Kennedy stressed that “§ 2 allows States to choose their own method of complying with the Voting Rights Act, and [the Court has] said that may include drawing crossover districts.” He further advanced that “states could draw crossover districts as they deemed appropriate” to remedy § 2 violations.<sup>231</sup> Justice David Souter, the author of *Strickland*'s principal dissent, similarly encouraged the creation of coalitional districts and praised the ability of such districts to “vindicate the interest expressly protected by § 2.”<sup>232</sup> This broad endorsement of the coalitional-district approach countervails

---

<sup>227</sup> See *Strickland*, 556 US at 23–25 (Kennedy) (plurality).

<sup>228</sup> See *Johnson*, 515 US at 916.

<sup>229</sup> See, for example, *Easley v Cromartie*, 532 US 234, 243–44, 257–58 (2001) (rejecting the plaintiffs' claim that racial considerations predominated the design of a North Carolina district plan, on the grounds that the design was instead predominated by political considerations).

<sup>230</sup> See text accompanying notes 185–87.

<sup>231</sup> *Strickland*, 556 US at 23–24 (Kennedy) (plurality).

<sup>232</sup> *Id* at 32 (Souter dissenting).

concerns that *Strickland* requires the creation of majority-minority districts to the exclusion of coalitional districts.<sup>233</sup>

#### D. Taking Stock: In Defense of the Defense

Thus far, this Part has undertaken a thorough legal analysis of the availability and potential merits of the § 2 defense. Namely, it has examined the legal basis for judicial recognition of the § 2 defense, constructed an analytical framework for evaluating the defense's merits, and envisioned how the defense's availability might impact state officials' districting choices. There remains, however, a yet-unexamined baseline question: As a normative matter, why should the law ever permit state officials to engage in race-conscious districting?

Government action based on racial classifications has rarely played an admirable role in American history.<sup>234</sup> Accordingly, to the extent that § 2 is in tension with the Equal Protection Clause's prohibition against "invidious discrimination,"<sup>235</sup> one might contend that it should not be tolerated as the basis of a judicially cognizable defense against claims of racial districting. After all, in Roberts's words, "[i]t is a sordid business, this divvying [ ] up by race."<sup>236</sup>

However, an interpretation of § 2 that allows room for race-conscious districting is normatively defensible in spite of this objection. As an initial matter, judicial acceptance of the defense may be the only way to reconcile the Voting Rights Act—widely hailed as one of the greatest triumphs of the civil rights movement—with the Equal Protection Clause. Importantly, this attempt at reconciliation is motivated by more than just a desire to offer states a way out of the "impossible position"<sup>237</sup> that they face when deciding whether and how to comply with § 2. Rather, the attempt is ultimately also driven by the recognition that both the Voting Rights Act and the Equal Protection Clause have generated positive results for the development of American race relations over time. The Voting Rights Act is "widely considered one of the most effective instruments of social legislation

---

<sup>233</sup> See text accompanying notes 157–59.

<sup>234</sup> See generally, for example, David F. Ericson, *Slavery in the American Republic: Developing the Federal Government, 1791–1861* (Kansas 2011).

<sup>235</sup> *LULAC*, 548 US at 461 (Stevens concurring in part and dissenting in part).

<sup>236</sup> *Id.* at 511 (Roberts concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>237</sup> *Id.* at 518 (Scalia concurring in the judgment in part and dissenting in part).

in the modern era of American reform”;<sup>238</sup> likewise, flexible, adaptive interpretations of the Equal Protection Clause’s scope have been celebrated by scholars as essential to the social progress that occurred over the course of the twentieth century.<sup>239</sup> These two sources of law must be made compatible with one another if they are to continue advancing race relations in the future.

Moreover, the availability of the § 2 defense, while permitting race-conscious state action to a limited extent, may counter-intuitively have the effect of *decreasing* racial polarization in electoral districts by incentivizing states to focus on creating coalitional districts in place of majority-minority districts.<sup>240</sup> Besides having a practical advantage over majority-minority districts by more effectively protecting states from liability, coalitional districts are also normatively superior because they downplay rather than emphasize racial polarization in voter preferences while reducing the extent to which political campaigns make targeted racial appeals.<sup>241</sup>

In addition to these effects-based arguments, scholars have advanced a variety of moral and political arguments in support of remedial race-conscious government action generally. For example, scholars have defended such remedial action on moral grounds by arguing that it neither is motivated by “invidious discriminatory animus” nor is “as pervasive or as ingrained in the social fabric” as historical examples of overt racial discrimination.<sup>242</sup> Remedial race-conscious action also contributes positively to the public policy goals of attaining political advancement for minorities and “eradicat[ing] [ ] debilitating stereotypes” over the long term.<sup>243</sup> In turn, scholars have further

---

<sup>238</sup> Jason Rathod, *A Post-racial Voting Rights Act*, 13 *Berkeley J Afr Am L & Pol* 139, 159 (2011) (quotation marks omitted).

<sup>239</sup> See, for example, Michael C. Dorf, *Equal Protection Incorporation*, 88 *Va L Rev* 951, 958 (2002).

<sup>240</sup> See Part III.C.

<sup>241</sup> See *Strickland*, 556 US at 34–35 (Souter dissenting) (“A crossover is thus superior to a majority-minority district precisely because it requires polarized factions to break out of the mold and form the coalitions that discourage racial divisions.”); Rathod, 13 *Berkeley J Afr Am L & Pol* at 191–93 (cited in note 238) (criticizing the creation of majority-minority districts because they “create environments obsessed with race,” “reward race-baiting candidates and punish post-racial candidates,” and “elect candidates who lack the cross-racial appeal to win statewide races”).

<sup>242</sup> Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 *Conn L Rev* 323, 353 (1990).

<sup>243</sup> Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 *Harv L Rev* 1327, 1329 (1986).

argued that the advancement of these goals comports with the pluralist-democratic vision that lies at the core of the nation's founding—a vision that “treats as primary the values of including all members of the polity and treating them as equal, coparticipants in constructing the fundamental values of the polity.”<sup>244</sup>

Thus, in addition to the legal grounds for judicial recognition of the § 2 defense, there exists strong normative support for the defense's recognition from pragmatic, consequentialist, moral, and political perspectives. The open question for the future, then, is not whether courts can or should begin to acknowledge the § 2 defense, but whether they will in fact rise to the occasion and begin to implement it in the courtroom—and if so, when.

### CONCLUSION

This Comment addresses the legal and historical bases that states may use to deploy § 2 of the Voting Rights Act as a defense against claims challenging district plans as racially discriminatory. In addition to the doctrinal support that exists for judicial recognition of the § 2 defense, normative reasoning also indicates that it is imperative that states have the § 2 defense at their disposal. Absent the defense's availability, states have no legally cognizable means of taking proactive measures to avoid or remedy a potential § 2 violation.

In addition to arguing in support of the § 2 defense's availability, this Comment also considers how courts would apply the § 2 defense in practice. It advocates for a regime in which courts evaluating the merits of the defense in the equal protection context would not grant deference to state legislatures' determinations of whether a given district plan was necessary and narrowly tailored to avoid a § 2 violation. Finally, and perhaps of most practical import, this Comment calls on states to create coalitional districts as a means of avoiding violations of both § 2 and the Equal Protection Clause. In combination, judicial recognition of the § 2 defense and states' reactive creation of coalitional districts would help to “hasten the waning of racism in American politics”—the ultimate ideal of § 2 itself.<sup>245</sup>

---

<sup>244</sup> Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 Md L Rev 150, 207 (1999). For arguments that remedial race-conscious government action plays a role in advancing pluralist-democratic ideals, see *id.* at 249–67; Brooks, 22 Conn L Rev at 367 (cited in note 242).

<sup>245</sup> *Strickland*, 556 US at 25 (Kennedy) (plurality), quoting *De Grandy*, 512 US at 1020.