Colorblind Redistricting: Racial Proxies as a Solution to the Court's Voting Rights Act Quandary

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"*All other rights are preserved by the right to vote.*"[1]

I. Introduction

Emerson Moser, who was Crayola's senior crayon maker, having molded over 1.4 billion crayons in his 37-year career, revealed upon his retirement that he was blue-green colorblind.[2] Bulls are colorblind and will charge at a matador's waving cape no matter what color it is.[3] All people are colorblind at birth.[4] Even the Constitution is colorblind.[5] So, is colorblindness a good thing or a bad thing? Not so good for a crayon-maker, but what about for our Constitution, our courts, our laws, and our elected officials? Color still matters. This basic tenet is reflected in many of our laws and in the actions of our elected officials. The missing link is the Court, hiding behind errant stare decisis and hopeful alternatives.

One law that recognizes the importance of race (or "color") is the Voting Rights Act of 1965 (hereinafter "Act"). As a 37-year-old law that has gone through many amendments, the Act has elicited a significant amount of commentary. There is also a plethora of judicial

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1. Reverend Jesse Jackson, Address at UC Hastings College of the Law (Feb. 20, 2001).

2. http://www.comedy-zone.net/ezine/jun01/290601.htm (last visited Feb. 4, 2002).

3. http://www.myjokemail.com/120501.htm (last visited Feb. 4, 2002).

4. http://www.galaxyofhealth.com/bodyfacts.html (last visited Feb. 4, 2002).

5. *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan., J. dissenting).

opinions interpreting the Act, resulting in some truly gobbley-goop precedents.[6] Much scholarly writing on the subject has sought to create a blueprint for local governments to follow to avoid litigation, attempting to find a way to incorporate all of the Court's holdings into one easy-to-follow paint-by-number.[7] This Note does not attempt to fit a state's options into these narrow, conflicting, confusing confines. Instead, it criticizes the Court's lack of coherent direction for the states, points out the serious strain that strict scrutiny places on the Voting Rights Act, and suggests ways that the Court can provide better guidance, including an exploration of the viability of racial proxies[8] as a way to circumvent the Court's insistent colorblind mess.

What mess? Where? In the wake of renewed commitment to a colorblind ideal,[9] an inherent tension in the 1965 Voting Rights Act has become apparent: it looks and smells unconstitutional, but the Court does not wish to say as much. In order to wash this unpalatable taste from its mouth, the Court has issued a series of opinions meant to zero in on a solution.[10] The opinions seem to indicate the Court's wish to accomplish the goals of the Voting Rights Act—namely, redistricting to give racial minorities an equal voice in the political process—without actually having to apply the strict scrutiny necessary for all race-based legislation.[11] The Court's answer? A benign race proxy.

However, the Court has been overly slow, repetitive, and contradictory in its recent applicable cases. Though a majority of the Justices appear ready to make the changes necessary to ensure the Act's productive future, they have so far only hinted about how they wish to frame this issue in the future. The Court may have "stare-decisis-ed" itself into a corner. If the Court does what it needs to do

6. *See infra* text accompanying notes 49-72.

7. *See infra* text accompanying notes 48-71.

8. "Proxy" is defined by Merriam-Webster's Collegiate Dictionary on the Internet (http://www.m-w.com/cgi-bin/dictionary) as "authority or power to act for another." Webster's Revised Unabridged Dictionary online (http://humanities.uchicago.edu/forms_unrest/webster.form.html) defines "proxy" as "[t]he person who is substituted or deputed to act or vote for another." Therefore, a "racial proxy," as continuously used in this Note, means anything that can be substituted for race as a classification that will act in the same way that race would act.

9. *See generally* Shaw v. Reno, 509 U.S. 630 (1993), Shaw v. Hunt, 517 U.S. 899 (1996), Hunt v. Cromartie, 526 U.S. 541 (1999), Hunt v. Cromartie, 532 U.S. 234 (2001).

10. *Id.*

11. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

to make the Act a viable tool for creating more racial equality in voting power, it may have to backtrack on decades of precedent, forsaking principles of *stare decisis* with respect to its holding that all race-based classifications, benign, invidious, or neutral, need to be subjected to strict scrutiny.[12] Strict scrutiny is the death knell of a voting rights racial districting case—despite what the Court has previously said.[13] If the Court chooses not to reject its precedents, proxies for race may get the Court out of the corner into which it has painted itself. Although better than total rejection of race as a consideration in redistricting, proxies do not enable the Court to recognize that colorblindness is not desirable in the context of voting rights. Proxies are not good enough.

This Note will first provide a limited background of the Voting Rights Act, then an evolution of strict scrutiny as applied to Voting Rights Act cases. The discussion section will attempt to show that the Voting Rights Act violates the Fourteenth Amendment's Equal Protection Clause as currently interpreted, and that the Court has been purposefully avoiding this issue, aware of the potential problem. Second, I will explore the reasons for the Court's avoidance of the Act's unconstitutionality and how the Court's feelings about its own strict scrutiny precedents seem to be changing. Third, this Note will address the way in which the Court hopes to avoid changing strict scrutiny rules by encouraging the adoption of benign racial proxies. Finally, I will conclude with a review of the Court's options for the future. Despite a strong move in the right direction with its recent *Hunt v. Cromartie*[14] ruling, the Court still has not resolved all the issues that it created over the past six years. With major elections occurring every two years, the Court will have ample opportunity to address them at length—hopefully doing more than circumventing the colorblind ideal with racial proxies.

II. Background

A. The Voting Rights Act

"[T]he Voting Rights Act of 1965 had the dramatic effect of breaking down the barriers that prevented African Americans from

12. *Adarand,* 515 U.S. 200.

13. *See id.* at 237. I say that strict scrutiny is a "death knell" for redistricting cases based on the outcomes of most racial redistricting cases. The states always seem to lose, despite encouraging words from the Court to try, try again.

14. Hunt v. Cromartie, 532 U.S. 234 (2001) [hereinafter *Cromartie II*].

voting in the deep South . . . [and] was spectacularly successful in accomplishing this goal."[15] The most important provisions that accomplished this result were the ban on literacy tests, the appointment of federal registrars where necessary, and the "preclearance" requirement in Section 5 of the Act.[16] Two sections of the Act apply directly to this discussion: Section 2 and Section 5.[17] Through them, the Court extended the utility of the Act to situations in which "blacks were able to vote, but by chance or design the system of representation had the effect of minimizing the influence of their votes."[18]

Section 5 of the Act applies only to "covered" states and counties. To be "covered" by Section 5, the state or county must first have had a test (usually a literacy test) affecting the right to vote in 1964. Second, the state or county must either have had less than 50% of the voting age population registered to vote in 1964 or less than 50% turnout in the 1964 presidential election among the voting age population.[19] In 1970, Congress amended the Act, referencing 1968 dates in the above formula.[20] Currently, nine states are covered in their entirety and seven more states have at least one county covered.[21] If a covered county or state wishes to make any change affecting voting, Section 5 forces the county to clear the change with the Department of Justice (hereinafter "DOJ") before it can be implemented.[22] Annexing territory, expanding districts, eliminating an elected office, changing district boundaries, and expanding the size of an elective body are all examples of things that need to be approved by the DOJ under Section 5.[23]

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15. DANIEL HAYS LOWENSTEIN, ELECTION LAW CASES AND MATERIALS 143 (1995). *See also* Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING 7, 21 (1992) ("In Mississippi, that stronghold within a stronghold, black voter registration increased from 6.7 percent before the act to 59.8 in 1967. The act simply overwhelmed the major bulwarks of the disfranchising system. In the seven states originally covered, black registration increased from 29.3 percent in March 1965 to 56.6 percent in 1971-72; the gap between black and white registration rates narrowed from 44.1 percentage points to 11.2.").

16. *See* LOWENSTEIN, *supra* note 15, at 143.

17. 42 U.S.C. § 1973 (1999).

18. LOWENSTEIN, *supra* note 15, at 143.

19. 42 U.S.C.§ 1973(b) (1999).

20. http://www.usdoj.gov/crt/voting/sec_5/types.htm (last visited Feb. 5, 2002).

21. 28 C.F.R. §51.4 (2002), "Appendix to Part 51—Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended," (7-1-92 Edition), 824-26.

22. 42 U.S.C. §1973(c) (1999).

23. 28 C.F.R. §51.13 (2002).

Getting approval from the DOJ is referred to as getting "preclearance" and requires a showing that the voting procedure in question "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[24] The test established for getting preclearance is neutral or better treatment of minorities.[25] Retrogressive changes (i.e. changes that worsen the minority position) should never receive preclearance.[26] Preclearance forces the jurisdiction that adopted the change to justify it without even requiring a plaintiff group to challenge it, a benefit to many minority plaintiff groups who may lack the resources to go to court.[27]

The other relevant part of the Act is Section 2, which "provides opportunity to challenge longstanding procedures or procedures adopted in uncovered jurisdictions. It also provides an opportunity for plaintiffs to object to a preclearance that has been granted [under Section 5]."[28] Although this Section originally focused on prerequisite tests to voting (usually English literacy tests), one of the most common uses today is in contesting a redistricting proposal,[29] the use at issue in this Note. Section 2 prohibits electoral devices, like redistricting, that deprive minorities of equal opportunity to elect other minorities.[30] This situation can be described in the following hypothetical: An Alabama city districting plan creates a new twenty-eight-sided representation of its city limits from what used to be a square. This new boundary just happens to exclude almost all black voters from the city limits. Black plaintiffs bring a suit claiming "an intent to fence black voters out of exercising political power."[31] What can the Court do? On what basis may a state or municipality re-draw those district lines? How much of a role can race play? We know that the city has done something wrong because it used race as the criteria for drawing discriminatory boundaries. No colorblindness there. But should it be wrong for a less racist city plan to take color

24. Beer v. United States, 425 U.S. 130, 133 (1976).

25. *Id.* at 141.

26. *Id.* at 141 n.12.

27. *See* LOWENSTEIN, *supra* note 15, at 184-85.

28. *Id.*

29. *See* Margarite Leone, Esq., Lecture for Election Law class at UC Hastings College of the Law (Nov. 30, 2000).

30. 42 U.S.C. § 1973 (1999).

31. T. Alexander Aleinikoff and Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 606 (1993) (describing the scenario of *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

into account when re-drawing the lines to include all the city's residents? Racial considerations can be very detrimental in some circumstances and overwhelmingly important in others. The Court should recognize that colorblindness is not always the answer.

B. The Evolution of Strict Scrutiny for Benign Racial Classifications

The Court struggles on with the question of what role race can play in reaching the goal of a colorblind America. The purpose of this section is to outline the beginnings of the Court's application of strict scrutiny to beneficial racial classifications in order to provide a background for the subsequent attack of this policy and to explain why and how some members of the Court may be attempting to escape that decision.

Race-specific classifications that benefit minorities, referred to as benign or beneficial classifications, were not subjected to strict scrutiny until 1995 in *Adarand Constructors, Inc. v. Pena*.[32] In arriving at the present doctrine on this topic, the Court managed to go through several iterations in the level of scrutiny the Justices felt should be applied where the racial classification benefited minorities. In 1978, the Court attempted to converge on a level of intermediate review in *University of California v. Bakke*.[33] In that case, UC Davis Medical School adopted an affirmative action program which set aside 16 of 100 seats in the class for members of minority groups.[34] The Court, in a plurality opinion, struck the program down by a 5-4 vote,[35] but failed to agree on the level of review necessary for their finding. The four Justices who voted to uphold the program agreed that it should be subject to "intermediate" review.[36] Four others wanted it struck down on federal statutory grounds (Title VI) and therefore, never stated a standard of review.[37] The final tie-breaking Justice (Powell) struck it down by applying strict scrutiny.[38]

The Court's next attempt at developing an appropriate level of scrutiny for racially benign classification came in 1980 with *Fullilove v. Klutznick*.[39] There, the Court upheld a Congressional affirmative

32. 515 U.S. 200 (1995).
33. 438 U.S. 265 (1978).
34. *Id.* at 275.
35. *Id.* at 271.
36. *Id.* at 362.
37. *Id.* at 421.
38. *Bakke*, 438 U.S. at 299.
39. 448 U.S. 448 (1980).

action program requiring 10% of public works project funds to be given to minority business enterprises. The Court never explicitly stated the standard of review that it applied in reaching its decision, but said that the situation called for "close examination."[40] Nine years later in *City of Richmond v. J.A. Croson Co.*,[41] the Court finally agreed on a strict scrutiny standard of review when it struck down a city program that set aside 30% of funds for city projects for minority business enterprises.[42] The case stood for the rule that strict scrutiny must be applied for beneficial race-specific classifications enacted by a *state* government body in order to "smoke out" illegitimate uses of race, since even benign categorizations carry a danger of stigmatic harm.[43]

The next year, in 1990, in *Metro Broadcasting, Inc. v. Federal Communications Commission*,[44] the Court upheld an FCC preference policy for minority station owners based on a desire to enhance the diversity of programming available on the networks, applying only intermediate review to this federal program.[45] The Court sought to distinguish the level of scrutiny necessary for benign racial classifications based on whether the program was of state or federal origin.

But five years later, the Court changed its mind in *Adarand v Pena*.[46] The majority felt that an interest in "consistency" required that whenever the government treats a person unequally because of his or her race, that person has suffered an injury that falls within the language and spirit of the Equal Protection Clause.[47] Therefore, the rule from that case, which continues to stand today, is that all racial classifications, whether the purpose is to benefit or burden, whether imposed by federal, state, or local government, must be analyzed under strict scrutiny.[48]

40. *Id.* at 472.
41. 488 U.S. 469 (1989).
42. *Id.*
43. *Id.* at 493.
44. 497 U.S. 547 (1990).
45. *Id.* at 566.
46. 515 U.S. 200 (1995).
47. *Id.* at 224.
48. *Id.* at 227.

C. The Voting Rights Act Cases

The Court's jurisprudence of the Voting Rights Act, and in particular, the Court's chosen level of scrutiny in evaluating state compliance with its principles in the redistricting situation, is directly related to the Court's evolution of thought on strict scrutiny. In this section, I hope to lay that foundation.

The Court's first seminal case regarding districting plans was *Gomillion v. Lightfoot* in 1960, in which the Court invalidated a districting plan because the lines were drawn with a racially discriminatory purpose.[49] Four years later, in *Reynolds v. Sims* the Court created its now famous "one person, one vote" doctrine,[50] which caused a massive redistricting drive to meet the new standard.[51] The following year, the Voting Rights Act was passed by Congress. Eight years later in 1973, *Georgia v. United States*[52] held that the adoption of legislative districting plans was subject to preclearance under Section 5 of the Act. Hence began the Court's painfully slow process of interpreting the Act.

Beginning with *Beer v. United States*[53] in 1976, the Court began to develop the non-retrogression principle of Section 5. New ameliorative apportionments "cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution,"[54] referring, of course, to the Equal Protection Clause.

The following year in *United Jewish Organization v. Carey*[55] the Court attempted to outline the way in which states should proceed in complying with the Act, deciding that a state could, by

> employing sound districting principles such as compactness and population equality, . . . attempt to prevent racial minorities

49. 364 U.S. 339 (1960).

50. 377 U.S. 533 (1964).

51. The phrase "one person, one vote" was not coined in the case, but the meaning behind the phrase that was to come later was explored. "Legislators represent people, not trees or acres." The Court went on to explain that the weight of people's votes should not be diluted because their particular district contains 100 people while the neighboring district contains only 50. Where a 100-person district and a 50-person district both have the same right to elect one representative, the effect is to give twice as much weight to the votes coming from the 50-person district. *See generally* Reynolds v. Sims, 377 U.S. 533 (1964).

52. 411 U.S. 525 (1973).

53. 425 U.S. 130 (1976).

54. *Id.* at 141.

55. 430 U.S. 144 (1977).

> from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.[56]

In 1986, a full nine years later, in *Thornburg v. Gingles*,[57] the Court finally developed the three-pronged test for establishing a Section 2 violation. This test required minority plaintiffs bringing an action against the state (or subdivision thereof) to show that (i) the minority group is large enough to constitute a majority in a single-member district; (ii) the minority group is "politically cohesive"; and (iii) the white majority usually votes as a bloc for candidates different from those supported by minority voters.[58] In an interesting case that same year, *Davis v. Bandemer*, the Court applied a test of intermediate scrutiny to *political* gerrymandering, the drawing of district lines based on political affiliation.[59]

Finally, we come to the modern cases where the Court recognized, for the first time, a constitutionally-based cause of action for voting rights violations, established a standard of strict scrutiny for review of benign race classifications in redistricting, and attacked the DOJ's interpretation of its role in ensuring Section 5 compliance—all this in the 1993 *Shaw v. Reno* decision.[60] *Hays v. Louisiana* expounded upon *Shaw I* the next year, holding that "any plan that entails more racial gerrymandering than is absolutely necessary to pass Voting Rights Act muster is potentially unconstitutional."[61]

Miller v. Johnson[62] was the next major decision of the Court. It held that where race is the predominant, overriding factor in

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56. *Id.*

57. 478 U.S. 30 (1986).

58. *Id.* at 56.

59. 478 U.S. 109 (1986). "Gerrymander" is defined by Merriam-Webster's Collegiate Dictionary on the Internet, http://www.m-w.com/cgi-bin/dictionary, as "to divide (an area) into political units to give special advantages to one group." Webster's Revised Unabridged Dictionary Online, http://humanities.uchicago.edu/forms_unrest/webster.form.html, defines "gerrymander" as "[t]o divide (a State) into districts for the choice of representatives, in an unnatural and unfair way, with a view to give a political party an advantage over its opponent." Webster's Unabridged is a description of a political gerrymander at the state level, while Merriam-Webster's definition is broader and applicable to all types of gerrymander, including both political and racial gerrymanders, at all levels of districting.

60. 509 U.S. 630 (1993) [hereinafter *Shaw I*].

61. 839 F.Supp. 1188, 1197 n.21 (W.D.La. 1993), *prob. juris. noted*, 115 S.Ct. 687 (1994).

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

redistricting, proven by showing that the state relied on race in substantial disregard of customary and traditional districting practices, it must satisfy strict scrutiny.[63] In *Bush v. Vera* the Court held that "strict scrutiny does not apply merely because redistricting is performed with consciousness of race."[64] "[F]or strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated' to race."[65]

Shaw v. Hunt,[66] or *Shaw II*, addressed three potentially compelling state interests and found that "creating an additional majority-black district was not required under a correct reading of § 5"[67] and that the new district was not a narrowly tailored remedy for the state's professed interest in avoiding Section 2 liability since it was so oddly shaped.[68] This has meant that as long as there is no retrogression, any creation of an additional minority district must conform to "normal" size and shape to be narrowly tailored enough for the compelling interest of remedying past discrimination.

Hunt v. Cromartie[69] is a follow-up case weighing in on this issue of redistricting and race. It overturned the lower court's summary judgment for the plaintiffs, holding that a bizarrely shaped district is not constitutionally vulnerable if political, rather than racial, ends motivated the legislature.[70] This was a fairly stark change for the Court. The case was remanded to the lower court and made its way back to the U.S. Supreme Court in *Cromartie II*,[71] the Court's most recent holding. There, a generally dissenting Justice Breyer wrote for the majority that the North Carolina legislature's motive in the creation of Congressional District 12 was not predominantly racial, but rather political since "race in this case correlates closely with political behavior."[72] He also took the opportunity to reiterate and add to the high proof threshold that a plaintiff faces and the high deference a court must show to legislative prerogative. This case is a huge move in the right direction for the Court and shows the

63. *Id.* at 916.
64. 517 U.S. 952, 958 (1996) [hereinafter *Vera*].
65. *Id.*
66. 517 U.S. 899 (1996).
67. *Id.* at 911.
68. *Id.* at 907.
69. 526 U.S. 541 (1999) [hereinafter *Cromartie I*].
70. *Id.* at 551.
71. 532 U.S. 234 (2001).
72. *Id.* at 257.

increasing influence of the previously dissenting Justices on the majority.

III. Discussion

The future of the Voting Rights Act looks somewhat bleak in the face of the Court's strict scrutiny holdings. Its initial purpose of ensuring that racial minorities are not denied the right to vote has been fulfilled,[73] so perhaps the Act should be allowed to lapse in 2007 when it is set to expire. But if the evolving purpose of the Act, to give minorities an equal opportunity to elect minority candidates of their choice and to ensure diversity in our legislative arenas, is important to the Court and to our country, the Court must find a way to make it work. This section will continue the discussion of the Court's strict scrutiny jurisprudence in the context of the modern voting rights cases. First, it will explore how the Act might be seen as unconstitutional if the Court doesn't watch its step. Next, it will examine the Court's uncertainty about its strict scrutiny precedence. Third, this section will delve into the possible saving grace of the Act—benign racial proxies.

A. The Voting Rights Act is Probably Unconstitutional Considering the Court's Current Strict Scrutiny Jurisprudence.

The Equal Protection Clause of the Fourteenth Amendment of our United States Constitution reads, in pertinent part, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[74] In applying this amendment, *Adarand* imposes strict scrutiny even on racial classifications that benefit minorities and are enacted by Congress.[75] The Voting Rights Act was enacted by Congress. Additionally, the Act attempts to protect (benefit) racial minorities in the redistricting process by forcing states to keep racial considerations in mind when drawing new lines. So why hasn't the Act been subjected to strict scrutiny? It fits the profile, after all. Section 5 benefits minorities by preventing retrogressive voting changes that have the effect or purpose of "denying or abridging the right to vote on account of race or color."[76] This Section is based entirely on minority classification,

73. *See* LOWENSTEIN, *supra* note 15.

74. U.S. CONST., amend. XIV.

75. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

76. Beer v. United States, 425 U.S. 130, 133 (1976).

so it clearly warrants strict scrutiny by the Court. Section 2 is similarly based on minority classification, prohibiting any redistricting that deprives minorities of an equal opportunity to elect other minorities. So does the Act survive strict scrutiny?

Under strict scrutiny, the Voting Rights Act's constitutionality is questionable at best. Strict scrutiny requires that the Act be narrowly tailored to fit a compelling interest.[77] The Court has left no doubt that remedying past discrimination qualifies as a compelling interest, but has been quite reluctant to address other potential compelling state interests having to do with Section 5 and Section 2 compliance.[78] Hence, the narrowly tailored prong has also become problematic.

1. Section 5 Fails the Narrowly-Tailored Prong By Being Overinclusive.

In Section 5, the Act attempts to achieve narrow tailoring by being applicable solely to "covered" states and counties. Although this is a good start toward staying away from over- or under-inclusion, it has many problems. The criteria for identifying "covered" counties tend to make the Section over-inclusive[79] because they have led to the inclusion of many areas of the country not traditionally thought of as discriminatory.[80] Relatively progressive counties that happened to have a large prison population ineligible to vote or a large military population that voted absentee in another county were subsumed by the Section 5 criteria.[81] Whether this over-inclusion is serious enough to warrant a finding of unconstitutionality is questionable; but if you live in one of the four covered counties in California,[82] the answer may seem all too abundantly clear. Take for instance, Monterey County. Monterey became a "covered" county when it was found to have a test affecting the right to vote in 1968 (although it was a statewide literacy test and not a local ordinance) and less than 50%

77. Wygant v. Jackson Bd. Of Educ., 476 U.S. 267, 274 (1986).

78. The compelling state interest I have in mind is an interest in increasing minority representation in legislative arenas. This would entail recognizing the merits of the DOJ's interpretation of Section 5's requirements and allowing the DOJ to require better than non-retrogressive redistricting where possible.

79. Recall the criteria: The state or county must have had (i) a test affecting the right to vote in 1964 (or 1968); (ii) less than 50% of the voting age population registered to vote in 1964 (or 1968); and (iii) less than 50% turnout in the 1964 (or 1968) presidential election.

80. *See* Leone, *supra* note 29.

81. *Id.*

82. Kings County, Merced County, Monterey County, and Yuba County. 36 C.F.R. § 5809 (1971).

participation of its voting age population in the November 1968 Presidential election.[83] Its population in 1990 aged 18 and over (voting age) was made up of 17.6% non-citizens.[84] It also included Fort Ord and other armed forces locations including the Naval Language Institute, accounting for 8.5% of 18 and over residents, and Soledad State Prison with 2.6%. These numbers show that 28.6% of Monterey County's voting age population may have been highly transitory, likely to vote absentee, or ineligible to vote due to incarceration or lack of citizenship. Coupled with the fact that the literacy test was a statewide law and not a specially enacted local ordinance designed to discriminate against language minorities, Monterey County appears to provide ample evidence that Section 5 is overinclusive.

2. Section 5 Fails the Narrowly-Tailored Prong By Being Overbroad.

Section 5 lacks narrow tailoring in its broad policy of DOJ discretion in granting preclearance. The DOJ had been under the impression that its legislatively granted discretion in the redistricting context allowed it to demand, not merely non-retrogression, but in some cases an actual increase in the ability of minorities to elect minority representatives (i.e. more minority dominated districts). But the Court soon slapped the DOJ's hand for its presumptuousness. *Shaw I* held that a "reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression."[85] In *Miller v. Johnson*, the Court interpreted the DOJ's position as amounting to an insistence on maximizing black voting strength through the use of race-based districting, a position going beyond the scope of the Act, bringing it "into tension with the Fourteenth Amendment."[86] A proactive reinterpretation of the statute allowed the Court to find, "There is no indication Congress intended such a far-reaching application of [the Act], so we reject the Justice Department's interpretation of the statute and avoid the constitutional problems

83. Lopez v. Monterey County, 525 U.S. 266, 271 (1999).

84. All demographic information found *at* http://countingcalifornia.cdlib.org (last visited Feb. 5, 2002). Unfortunately, complete information was not available for 1968 when the county's coverage was determined, but 1990's statistics should serve as a relevant example nonetheless.

85. Shaw v. Reno, 509 U.S. 630, 654 (1993).

86. Miller v. Johnson, 515 U.S. 900, 927 (1995).

that interpretation raises."[87] *Vera* reiterated that the problem with the state's interest in complying with Section 5 is that it seeks to justify not maintenance, but substantial augmentation of the black population percentage in the district.[88] *Shaw II* also found that "creating an additional majority-black district was not required under a correct reading of § 5."[89]

Those "constitutional problems" that the Court fretted over in *Miller* should not be so easily judicially-interpreted away. The lack of clear Congressional intent is part of what makes this Section overbroad. Congress delegated too much legislative power to the DOJ in Section 5, failing to narrowly tailor its law. But more important is the flippant rejection of a possible Congressional intent to increase minority representation beyond non-retrogression. It seems impetuous of the Court to find over and over again that the DOJ's interpretation of the scope of the Act was wrong, but ignore that there was also no indication that Congress did not intend such far-reaching application. This is judicial interpretation gone amok in order to avoid finding the Act unconstitutional. The logical conclusion from the Court's holdings and omissions is that Congress defined too broadly the DOJ's power (so that the law is not narrowly tailored) and defined too opaquely its own legislative intent (so that there is no clear compelling objective).

The Court has purposefully avoided the issue of the constitutionality of the Act by refusing to adequately address Congressional intent as to compelling state interest—compliance with Section 2 or with Section 5 or possible proactive increase in minority representation—and has ignored the lack of narrow tailoring. The Court stretches and stretches and interprets and re-interprets, trying mightily to bring the Voting Rights Act within the Fourteenth Amendment's mandate. But close inspection reveals the Act's constitutional strict scrutiny failure and the Court's blissful blind eye.

B. The Court No Longer Seems Certain of the Across-the-Board Application of Its Strict Scrutiny Precedence.

The Court seems to be having some difficulty maintaining its hard-nose line of strict scrutiny when it comes to some forms of beneficial race-based classifications—namely those classifications involved in voting rights. Although the Court has followed the

87. *Id.*

88. Bush v. Vera, 517 U.S. 952, 983 (1996).

89. Shaw v. Hunt, 517 U.S. 899, 911 (1996).

legislature's lead in steering clear of any proportional representation-esque schemes, the Justices do not seem willing to completely let go of the dream of a racially colorblind society where black and white citizens will not be separated by their dearth or plethora of political representation. Despite some of its overly-rosy holdings, the Court does seem to recognize, along with the academic community, that the utopia of a colorblind society has not yet come. "Even assuming the validity of long-term aspirations toward a constitutional norm of color blindness, the fact remains that this society can no longer tolerate an absence of minority representation in its elite institutions, be they professional academies or legislative halls."[90] Given the Court's comprehension of the situation, the Court should also discern that race-based preferences are still a viable way to achieve equality in political representation. So what can the Court do and what has it done?

The Court's current version of strict scrutiny jurisprudence for voting rights makes it very easy for the plaintiff[91] to meet its burden, but very difficult for the state to meet its burden. Not only has the Court narrowed the number and scope of acceptable compelling interests (possibly in contravention of actual Congressional intent), it has made it extremely difficult to accomplish that goal in a narrowly tailored way. Despite these precedents, the Court seems to have recently become somewhat uncomfortable with its across-the-board application of strict scrutiny for all racial classifications.[92]

> [W]e wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." (citations omitted). The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.[93]

The Court's seminal decision instituting strict scrutiny for all beneficial race-based classifications bears out the Court's intent.

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90. Aleinikoff & Issacharoff, *supra* note 31, at 650.

91. In this case, the plaintiff to whom I refer is usually a non-minority group, challenging a new minority controlled voting district.

92. Compare this "somewhat uncomfortable" feeling that I attribute to the Court regarding its *Adarand* holding with the Court's "blissful blind eye," regarding the unconstitutionality of Section 5 of the Act (*supra* page 74). While the Court is in denial about the possible constitutional infirmities of the Act, the uncomfortable feeling I now address is based in part on a simultaneous recognition that it can no longer remain in denial.

93. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995), *quoting* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980).

Only six years ago, the Court fully intended that strict scrutiny would be applied in such a way that beneficial racial classifications could persist in order to accomplish compelling state objectives such as enhanced diversity[94] and eliminating discriminatory effects.[95] Nonetheless, the Court seems to have felt itself slowly slipping into the morass of "fatal in fact" review of beneficial race-based classifications and doesn't like where it's going.

The *Bakke* case is relevant to this discussion because of tie-breaking Justice Powell's discussion of strict scrutiny in his concurring opinion.[96] Although not the opinion of the Court, and prior to a definitive decision about the application of strict scrutiny, it does supply some insight into the beginnings of the Court's thinking on the subject of strict scrutiny. Justice Powell found two possible compelling state interests that might be upheld if the educational affirmative action program was narrowly tailored. First, the state might wish to remedy past discrimination, but Justice Powell faulted California for making no specific findings of past discrimination.[97] If it had, it seems that Justice Powell would have been satisfied of the compelling interest. Second, the state might have an understandable and proper interest in diversity, but Justice Powell criticized the means chosen by the university as too rigid to be narrowly tailored.[98] But Justice Powell did identify a program that he felt would pass his strict scrutiny test.[99] He praised Harvard's affirmative action plan that treated race as only one factor in admissions, a "plus" for the applicant.[100] Harvard's plan did not insulate a specific number of seats for minorities as did UC Davis' plan.[101] For Justice Powell, meeting the narrowly tailored test was not that difficult. Seventeen years later, the Court said it wanted to make sure that it would still be possible to survive a strict scrutiny review.[102] What happened to the Court's conviction?

Somewhere in between 1978 and the *Adarand* case, the Court

94. Metro Broadcasting Inc. v. Federal Communications Commission, 497 U.S. 547 (1990).

95. *Adarand*, 515 U.S. at 237-38.

96. *See supra* text accompanying notes 33-38.

97. *Adarand*, 515 U.S. at 307-310.

98. *Id.* at 311-315.

99. *Id.* at 316.

100. *Id.* at 316-317.

101. *Id.* at 317.

102. *See generally Adarand*, 515 U.S. 200 (1995).

turned a little sour on "benign" race-based classifications. In *Croson*, the Court struck down a city program that set aside 30% of funds for city projects for minority business enterprises.[103] There the Court applied strict scrutiny and faulted the City Counsel for not identifying the specific discrimination that it sought to remedy in such a way as to show a compelling state interest.[104] Perhaps the Court was moved to finally adopt a strict scrutiny framework because of the extraordinary circumstances of the case, which may have allowed members of the Court to imagine some level of reverse discrimination by a City Counsel dominated by African-Americans.[105] There was, after all, a spotty discrimination finding,[106] a statistical comparison that did not address the correct situation,[107] and no target minority-group.[108] It looked like a situation rife with systemic abuse and reverse discrimination, almost a natural scenario (if ever there could be one) for the Court to feel that strict scrutiny was necessary to "smoke out" illegitimate uses of race.[109] This situation of a not-carefully-crafted city ordinance led the Court down the dark path of strict scrutiny destruction.

Justices Marshall and Blackmun make convincing arguments in their dissents about the Court's mistake in insisting on strict scrutiny for beneficial race-based categories. Marshall points out that numerical and political supremacy is one factor to consider when determining the level of scrutiny to apply, but minorities cannot be suspect because they have achieved these things.[110] Other indicia are

103. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989).

104. *Id.* at 505, 510.

105. "Five of the nine seats on the City Council are held by blacks." *Id.* at 495.

106. The Court quotes a member of the City Council as saying, "There is some information, however, that I want to make sure that we put in the record. I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct of the construction industry in this area, and the State, and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread." *Id.* at 480.

107. The statistics looked at the gross disparity between the black population in the city (50%) and the percentage of construction contracts awarded to minority businesses (0.67%). The Court suggested that the City Council should have looked at the percentage of black contractors in the city and compared that to the percentage of contracts awarded to those minority businesses instead. *Id.* at 499, 501-03.

108. The city used general anti-discriminatory language, including groups that had never experienced discrimination in the city— Aleuts, Eskimos, etc. *Croson*, 488 U.S. at 506.

109. *Id.* at 493.

110. *Id.* at 553 (Marshall, dissenting).

better: disabilities, history of purposeful unequal treatment, or relegation to a position of political powerlessness.[111] Blackmun continues in the same vein:

> So the Court today regresses. I am confident, however, that, given time, it one day again will do its best to fulfill the great promises of the Constitution's Preamble and of the guarantees embodied in the Bill of Rights - a fulfillment that would make this Nation very special.[112]

Might some of the Court have come around to these ideas?

The following year (1990), *Metro Broadcasting* brought a re-evaluation of the members' positions on strict scrutiny and benign racial classifications; the Court changed its mind when the federal government's program was on trial, applying only intermediate review.[113] But five years later the Court was to regress again. *Adarand* put an end to the question of when strict scrutiny would apply to benign racial classifications. And the answer, unfortunately, was always.[114] It didn't matter that a federal program was at issue this time. What suddenly mattered to the Justices was "consistency."[115] The majority felt that "consistency" meant that whenever the government treats a person unequally because of his race, that person has suffered an injury that falls within the language and spirit of the Equal Protection Clause.[116] How that strong language made it into a majority opinion of this previously wavering and divided Court is inexplicable. But the concurring opinions of Thomas and Scalia make it clear that strong opinions weighed into the discussion. Justice Thomas apparently equated this federal program with charity handouts, asserting that "racial paternalism and its unintended consequences can be as poisonous as discrimination," and "benign prejudice is just as noxious as discrimination inspired by malicious prejudice."[117] Justice Scalia added that the "government can never have a 'compelling interest' in discriminating on the basis of race in

111. *Id.*

112. *Id.* at 562 (Blackmun, dissenting).

113. Metro Broadcasting Inc. v. Federal Communications Commission, 497 U.S. 547 (1990). Does the idea underlying the *Metro* decision offend the Court's recently proffered notion of color-blindness? Can the federal government be allowed to make the assumption that diversity in color of station owners will lead to diversity of programming? Isn't that racist according to the Court's *Croson* concepts? So what if it is? Aren't we just glad that the Court has abandoned strict scrutiny for the moment?

114. *Adarand*, 515 U.S. at 237.

115. *Id.* at 229-30.

116. *Id.*

117. *Id.* at 241 (Thomas, concurring).

order to 'make up' for past racial discrimination," because "under our Constitution, there can be no such thing as a creditor or debtor race."[118]

But again, three Justices dissented. Justice Stevens criticized the Court's inability to differentiate between invidious and benign discrimination and questioned the majority's inconsistency when reviewing other types of discrimination—namely that gender discrimination is only given intermediate scrutiny.[119] Justice Stevens pointed out the anomalous result inherent in the new standard adopted by the Court: that it is now easier to enact affirmative action programs to remedy gender discrimination than racial discrimination.[120] Justice Ginsberg would also have held that a beneficial program should be reviewed under a less strict standard.[121] Perhaps these Justices have made a dent in the other six Justices' resolves in favor of strict scrutiny?

C. The Court Seems To be Encouraging the Adoption of Benign Racial Proxies as a Way To Avoid Stare Decisis Problems.

The Court has thus far successfully avoided applying strict scrutiny to a decision on the constitutionality of the Voting Rights Act. I submit that the Court's disinclination to address the issue stems in part from an inkling of how badly the Act would fare under its current strict scrutiny jurisprudence (discussed in the previous section). The other part of the Court's reluctance is based on the knowledge that the Act's purpose remains important and popular, "an acknowledgment that the interests of systemic legitimacy demand that important public institutions be integrated in late twentieth century America."[122] Perhaps for these reasons, the Court has begun to encourage a move away from the Act and its overt racial classifications, toward a system of benign racial proxies.

The Court's current moves were enabled in 1986 in *Davis v. Bandemer*[123] when the Court subjected a plaintiff's challenge of political gerrymandering to a test of mere intermediate scrutiny. This decision laid the foundation for a later substitution or proxy for the disfavored racial classifications: political party affiliation—a proxy

118. *Id.* at 239 (Scalia, concurring).

119. *Adarand*, 515 U.S. at 247 (Stevens, dissenting).

120. *Id.*

121. *Id.* at 271 (Ginsberg, dissenting).

122. Aleinikoff & Issacharoff, *supra* note 31, at 650.

123. 478 U.S. 109 (1986).

that avoids a painful strict scrutiny death. But it did not stop the Court's ever more antagonistic stance toward race classifications.

In 1993, *Shaw I* held that the Equal Protection Clause may be violated where redistricting is so extremely irregular on its face that it can only be viewed as an effort to segregate the races for purposes of voting.[124] This means that the redistricting forsakes traditional districting principles without sufficiently compelling justification.

> A plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.[125]

The Court quotes its 1943 *Hirabayashi* holding that "classifications of citizens solely on the basis of race . . . are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[126] In other words, avoid relying heavily on race distinctions, even though that seems to be what the Act commands. Too dominant a role for race can be fatal in the redistricting context if other relevant concerns are subordinated.[127] The Court is hereby laying its foundation for suggesting that line-drawers find some good racial proxies to supplement or hide racial considerations, or else! Race-based districting is required up to the point mandated by the Act, but sharply restricted beyond the federal mandate.[128]

The very next year, in case anyone missed it, *Hays* expounded upon *Shaw*, holding that "any [redistricting] plan that entails more racial gerrymandering than is absolutely necessary to pass Voting Rights Act muster is potentially unconstitutional."[129] The Court's use of the word "potentially" should have served as a flashing red light to redistricting states (as potential defendants) that in order to get away with an increased number of majority-minority districts (a better than non-retrogressive redistricting scheme), racial considerations must take a back seat to other considerations that would match up well with race. This seems to be a very odd, back-door use of race. Isn't

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124. Shaw v. Reno, 509 U.S. 630, 654 (1993).

125. *Id.*

126. Hirabayashi v. United States, 320 U.S. 81, 100 (1943), *quoted in Shaw I*, 509 U.S. at 643.

127. LOWENSTEIN, *supra* note 15, at 236-37.

128. *See id.* at 238.

129. Hays v. Louisiana, 839 F.Supp. 1188, 1196 n.21 (W.D.La. 1993), *prob. juris. noted,* 115 S.Ct. 687 (1994).

there "something inherently unsettling about a constitutional principle that allows race to be a key factor in drawing minority-dominated districts so long as the result does not advertise the ingredients of the process"?[130]

Just in case some states out there were still a little bit confused about the Court's underlying message, the Court handed down *Miller v. Johnson*.[131] *Miller* held that where race is the predominant, overriding factor in redistricting, proven by showing that the state relied on race in substantial disregard of customary and traditional districting practices, it must satisfy strict scrutiny. Aside from telling states that still insisted on using race to create new district lines that the districts had to "look good" (that is be compact, contiguous, and respectful of city and county lines),[132] the Court again reiterated in a not-too-overt way that states can avoid the fatal outcome inherent in strict scrutiny by relying on factors other than race. To further push the latter point, the Court identified three potential compelling state interests that all failed to pass muster under the narrowly tailored prong of strict scrutiny. The Court really seemed to go out of its way to let states know that it had only been kidding when it said that strict scrutiny was not an automatic death knell.[133] "Avoid it all costs!" seems the more accurate message after *Miller*. As the opinion of Justice Kennedy points out, "the essence of the equal protection claim . . . is that the State has used race as a basis for separating voters into districts."[134] So to avoid an equal protection claim, a state should stay away from racial considerations. Notably, the Court did recognize that "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to

130. Aleinikoff & Issacharoff, *supra* note 31, at 618.

131. 515 U.S. 900 (1995).

132. The academic community has repeatedly and consistently criticized the Court's reliance on oddly shaped districts to invalidate Section 2 compelling interest defenses, pointing out that "geography will [only] subdue - or hide - the evils of race-conscious districting while serving the goal of political legitimacy." Aleinikoff & Issacharoff, *supra* note 31, at 651. The ridiculousness of the Court's insistence on square voting districts is especially highlighted when you consider that "even the foundation blocks of the Union, the states, reveal odd configurations which would violate the 'traditional' districting patterns. The odd shapes of Maryland and West Virginia, and the peculiar inclusion of the Upper Peninsula in Michigan are notable examples." *Id.* at 616. Nonetheless, the Court has stuck to a scheme where, as long as there is no retrogression, any creation of an additional minority district must conform to size, shape, and other "traditional" districting factors in order to be narrowly tailored.

133. *See Adarand*, 515 U.S. at 237.

134. *Miller*, 515 U.S. at 911.

make."[135] So how do you make the distinction successfully? The Court is unhelpfully silent on this question, leaving states to flounder.

The plaintiff's burden is also an interesting facet of this issue:

> The plaintiff is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district.[136]

The Court makes it sound like a difficult threshold, as it should be to cause strict scrutiny of the state's choices and the reasons for them; but the tough-sounding bully is really a sheep at heart, allowing the non-minority plaintiff to soar over this high hurdle with ease.

In fact, the dissent charges that a federal case can now be mounted whenever the plaintiff plausibly alleges that other factors carried less weight than race; that genuine attention to traditional districting practices and avoidance of bizarre configurations, which seemed under *Shaw* to provide a safe harbor, no longer offer any protection.[137] It is through this methodology that the Court hints to states that race is not a safe consideration for them. The Justices seem to give states yet another glimpse into their hope that race will cease to be a factor that the states force the Court to address. A futile hope for colorblindness?

Vera only serves to reiterate the *Miller* decision and the inherent paradox within that case by holding that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race."[138] Here the Court tries to maintain some respect for a state's redistricting decisions (although seemingly only in word, not deed), making it sound like a state can still use a race criteria when fixing district lines. Despite those strong words, the Court found the influence that incumbency protection had on the plan inadequate to overcome the overwhelming use of race considerations. Although the actual outcome of the case seems to go against the idea that using racial proxies can be successful, the fact that incumbency protection loomed over the Court's discussion shows that a political proxy was making headway in chambers. Justice Stevens' dissent characterizes this decision as a free ticket for states to draw bizarre districts for white voters, but only compact, relatively square districts for minority

135. *Id.* at 916.

136. *Id.* (emphasis added).

137. *Id.* at 949 (Ginsburg, dissenting).

138. Bush v. Vera, 517 U.S. 952, 958 (1996).

voters[139]—another negative outcome indissolubly linked to strict scrutiny of beneficial racial classifications. *Shaw II* held, one more time, that creating a majority-black district not required by Section 5's non-retrogression principle would only be allowed if the new district was shaped more or less like a square.[140]

The dissent from *Shaw II* offers interesting fodder for this Note's discussion of racial proxies. Justice Stevens construes the majority opinion to mean that "although States may avoid strict scrutiny by complying with traditional districting principles, they may not do so by proffering pretextual, race-neutral explanations for their maps."[141] But he vehemently disagrees with the notion that race-neutral explanations are necessarily pretextual. In fact, he criticizes the majority, saying, "It is ironic that despite the clear indications that party politics explain the district's odd shape, the Court affirmed the district court's dismissal of the plaintiffs' partisan gerrymandering claim."[142] Justice Stevens' logic must have struck a chord with the majority of the Court, resulting in the very recent *Cromartie II* decision, which endorses his view of partisan gerrymandering.

Cromartie I was the transition case that enabled the Justices to dip their toes in to test the water before throwing themselves into *Cromartie II*. *Cromartie I* held that a bizarrely shaped district is not constitutionally vulnerable if the legislature was motivated by political, rather than racial, ends.[143] An affidavit by an expert witness who found strong correlation between racial composition and party preference was used to show that in precincts with high black representation, there is a correspondingly high tendency for voters to favor the Democratic Party. The Court accepted this evidence as enough to overcome summary judgment for the plaintiffs.[144]

> Evidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference.[145]

Is the Court stepping back from its prior habit of letting stand without

139. *Id.* at 1035-36 (Stevens, dissenting).

140. 517 U.S. 899, 911 (1996).

141. *Id.* at 932 (Stevens, dissenting).

142. *Id.* at 938 n.14 (Stevens, dissenting).

143. 526 U.S. 541, 551 (1999).

144. *Id.* at 549-50.

145. *Id.* at 551-52.

question any lower court finding that the plaintiff's strict scrutiny burden had been met? The Court answers, "Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black democrats and even if the State were conscious of that fact."[146] Have they really? Not on the surface. This statement only lends additional credence to the theory that while the Court says one thing, what it is really saying is quite another. Was the Court actually saying that political party affiliation can serve as an acceptable proxy for race, even when the district lines are less than box-like? What about those prior cases where the Court seems quite happy to just let the plaintiff's burden slide and address the state's district lines under strict scrutiny anyway? This is the corner into which the Court has painted itself—an unwillingness to go back and violate stare decisis, coupled with unhappiness with the current application of its precedents. Could the Stevens dissent in *Shaw II* be the way out?

The much anticipated *Cromartie II* opinion by Justice Breyer was heralded in the *New York Times* as "one of the most important since he joined the court."[147] In finally putting an end to the *Shaw* and *Cromartie* North Carolina District 12 problems, the Court resolutely proclaimed its support for correlating race with political behavior in order to avoid strict scrutiny.

> [T]he Constitution does not place an *affirmative* obligation upon the legislature to avoid creating districts that turn out to be heavily, even majority, minority. It simply imposes an obligation not to create such districts for predominantly racial, as opposed to political or traditional, districting motivations.[148]

In answer to Justice Stevens' *Shaw II* concerns, Justice Breyer declared that *Cromartie II* does not hold that "a legislature may defend its districting decisions based on a 'stereotype' about African-American voting behavior."[149] In fact, evidence of voter registration was specifically found to be inadequate. However, actual voting behavior was dispositive, showing in this case that black Democrats voted more reliably for the Democratic candidate than did white Democrats, who more often crossed over to vote for the Republican

146. *Id.* at 551.

147. Linda Greenhouse, *Justices Permit Race As a Factor in Redistricting*, N.Y. TIMES, April 19, 2001, at A1.

148. Hunt v. Cromartie, 532 U.S. 234, 249 (2001).

149. *Id.* at 257.

candidate.[150] Hence, the Court found that including the most reliable Democrats is consistent with a political, rather than a racial, motive.

Additionally, the Court re-iterated and sought to clarify somewhat the plaintiff's burden and the deference to legislative decisions courts must show:

> [G]iven the fact that the party attacking the legislature's decision bears the burden of proving that racial considerations are "dominant and controlling," [citation omitted], given the "demanding" nature of that burden of proof, [citation omitted], and given the sensitivity, the "extraordinary caution," that district courts must show to avoid treading upon legislative prerogatives, [citation omitted], the attacking party has not successfully shown that race, rather than politics, predominantly accounts for the result.[151]

In fact, the Court went on to extend that "demanding" burden of proof for the plaintiff, requiring the following:

> [W]here majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least:
>
> 1) that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles and
>
> 2) that those districting alternatives would have brought about significantly greater racial balance.[152]

So there it is. *Cromartie II* presents, on a silver platter, the way to better-than-non-retrogressive redistricting. It leads the previously wayward state, trying to give minorities a chance to elect candidates of their choice, a way out of strict scrutiny. If the data from North Carolina is generally applicable across the country, states and their subdivisions may now feel safe in couching redistricting with a race-based "look" in "most reliable Democrats" terms. The Court may have found its way out—for now. Political party voting behavior serves as a convenient benign racial proxy to enable avoidance of stare decisis problems. Score one for the Court!

150. *Id.* at 255.

151. *Id.* at 257.

152. *Id.* at 258.

IV. Conclusion

Is this racial proxy good enough? Is it a workable, useful precedent for states that will last? Certainly it allows the Court to maintain the ridiculous moral high ground of colorblindness. But that as yet unattained ideal simply should not be treated as if it were reality. The Court should drop the pretext of stare decisis and recognize that it has made a mistake in establishing strict scrutiny of beneficial racial classifications, especially in the voting rights context. We are not yet a colorblind society and are likely a long way from it. Despite Justice O'Connor's assurances to the contrary,[153] strict scrutiny does mean death to any and all racial classifications—even the beneficial ones.

The Court's recently endorsed approach to districting is to more freely recognize the potential for racial proxies like political party affiliation that can avoid strict scrutiny.[154] Although this may get the Court out from under its heavy strict scrutiny millstone, it does not adequately disentangle the Court from the Equal Protection paradox of the Voting Rights Act. Does it really make sense to allow party affiliation to act as a proxy for race in order to escape strict scrutiny for an oddly shaped new legislative district? What about income level? Common urban interests? It comes down to this: Do proxies solve the problem, or only make the contradictions within the spectrum of redistricting decisions more pronounced? I choose the latter.

Abandoning race as a viable consideration for beneficial programs is not the Court's best option. Race awareness does have a part to play in building America into the Court's dream utopia that eventually becomes colorblind. Although I applaud the Court's extension of the idea of political party as a racial proxy in *Cromartie II*, it will never suffice in the long run. Although the proxy clarifies some confusion of prior decisions, it also prompts states to pretend that race is not a factor—encouraging false colorblindness. No one is fooled. The Court has only promoted a semantic differentiation to justify the end result of majority-minority districting.

If the Court is unwilling to turn its back on stare decisis, it will be left to model future decisions after its short-term solution in *Cromartie II*: expect more and better proof from plaintiffs seeking to

153. *See Adarand*, 515 U.S. at 237.

154. *See* Hunt v. Cromartie, 526 U.S. 541 (1999).

prove that race was the overriding factor in setting new district lines, and strengthen the level of deference to legislative districting decisions courts must show. The Court had previously established a difficult-sounding burden for the plaintiffs, so it did not have to change much, although the augmentation to the burden is laudable. All that was necessary in *Cromartie II* was a crack-down on lower courts allowing plaintiffs to reach their burdens with ease. More deference might allow a softening of expectations on the state in showing a compelling interest with a narrowly tailored solution.

With the 2000 census complete, redistricting based on growing and shifting state populations is in full swing. There has already been a flurry of lawsuits filed against these new district plans, and there will undoubtedly be even more, seeking to invalidate those elections. Whether the anticipated gerrymandering claims will be centered on race or political party could be up to the Court.

In the future, the Court might choose the bold move of reinterpreting Congress' legislative intent embodied in the Act, expanding the compelling interest to one in "diversity"[155] or an increase in minority representation, not merely prevention of its demise. This is a bolder, longer-term solution than found in *Cromartie II*, and would eliminate some discussion of the Act's unconstitutional Equal Protection stickiness. It would also be a true move toward a more colorblind society, allowing states to increase minority representation out in the open, instead of hiding under the guise of a proxy that may become less legitimate over time and space.

Colorblindness is a laudable goal, but it is just that—a goal; and unattained as yet. Colorblind laws and colorblind courts cannot be successful until *people* are truly colorblind. The Court should recognize that one way to guide people to colorblindness is to create opportunities for racial equality in voting and political representation—let the Act do its job.

155. *See* University of California v. Bakke, 438 U.S. 256, 299 (1978).