SUPREME COURT OF THE UNITED STATES

No. 92–357

RUTH O. SHAW, ET AL., APPELLANTS *v.* JANET RENO, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[June 28, 1993]

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

The facts of this case mirror those presented in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144 (1977) *(UJO)*, where the Court rejected a claim that creation of a majority-minority district violated the Constitution, either as a *per se* matter or in light of the circumstances leading to the creation of such a district. Of particular relevance, five of the Justices reasoned that members of the white majority could not plausibly argue that their influence over the political process had been unfairly cancelled, see *id.,* at 165–168 (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.), or that such had been the State's intent. See *id*., at 179–180 (Stewart, J., concurring in judgment, joined by Powell, J.). Accordingly, they held that plaintiffs were not entitled to relief under the Constitution's Equal Protection Clause. On the same reasoning, I would affirm the district court's dismissal of appellants' claim in this instance.

The Court today chooses not to overrule, but rather to sidestep, *UJO*. It does so by glossing over the striking similarities, focusing on surface differences, most notably the (admittedly unusual) shape of the newly created district, and imagining an entirely new cause of action. Because the holding is limited to such anomalous circumstances, *ante*, at __, it perhaps will not substantially hamper a State's legitimate efforts to redistrict in favor of racial minorities. Nonetheless, the notion that North Carolina's plan,

under which whites remain a voting majority in a disproportionate number of congressional districts, and pursuant to which the State has sent its *first* black representatives since Reconstruction to the United States Congress, might have violated appellants' constitutional rights is both a fiction and a departure from settled equal protection principles. Seeing no good reason to engage in either, I dissent.

The grounds for my disagreement with the majority are simply stated: Appellants have not presented a cognizable claim, because they have not alleged a cognizable injury. To date, we have held that only two types of state voting practices could give rise to a constitutional claim. The first involves direct and outright deprivation of the right to vote, for example by means of a poll tax or literacy test. See, *e.g.*, *Guinn* v. *United States*, 238 U. S. 347 (1915). Plainly, this variety is not implicated by appellants' allegations and need not detain us further. The second type of unconstitutional practice is that which "affects the political strength of various groups," *Mobile* v. *Bolden*, 446 U. S. 55, 83 (1980) (STEVENS, J., concurring in judgment), in violation of the Equal Protection Clause. As for this latter category, we have insisted that members of the political or racial group demonstrate that the challenged action have the intent and effect of unduly diminishing their influence on the political process.[1] Although this

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[1]It has been argued that the required showing of discriminatory effect should be lessened once a plaintiff successfully demonstrates intentional discrimination. *See Garza* v. *County of Los Angeles*, 918 F. 2d 763, 771 (CA9 1990). Although I would leave this question for another day, I would note that even then courts have insisted on "*some* showing of injury . . . to assure that the district court can impose a meaningful remedy." *Ibid*.

severe burden has limited the number of successful suits, it was adopted for sound reasons.

The central explanation has to do with the nature of the redistricting process. As the majority recognizes, "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Ante*, at 14 (emphasis in original). "Being aware," in this context, is shorthand for "taking into account," and it hardly can be doubted that legislators routinely engage in the business of making electoral predictions based on group characteristics—racial, ethnic, and the like.

> "[L]ike bloc-voting by race, [the racial composition of geographic area] too is a fact of life, well known to those responsible for drawing electoral district lines. These lawmakers are quite aware that the districts they create will have a white or a black majority; and with each new district comes the unavoidable choice as to the racial composition of the district." *Beer* v. *United States*, 425 U. S. 130, 144 (1976) (WHITE, J., dissenting).

As we have said, "it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another." *Gaffney* v. *Cummings*, 412 U. S. 735, 753 (1973); see also *Mobile* v. *Bolden*, *supra,* at 86–87 (STEVENS, J., concurring in judgment). Because extirpating such considerations from the redistricting process is unrealistic, the Court has not invalidated all plans that consciously use race, but rather has looked at their impact.

Redistricting plans also reflect group interests and inevitably are conceived with partisan aims in mind. To allow judicial interference whenever this occurs would be to invite constant and unmanageable intrusion. Moreover, a group's power to affect the

political process does not automatically dissipate by virtue of an electoral loss. Accordingly, we have asked that an identifiable group demonstrate more than mere lack of success at the polls to make out a successful gerrymandering claim. See, *e.g.*, *White* v. *Regester*, 412 U. S. 755, 765–766 (1973); *Whitcomb* v. *Chavis*, 403 U. S. 124, 153–155 (1971).

With these considerations in mind, we have limited such claims by insisting upon a showing that "the political processes . . . were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White* v. *Regester, supra*, at 766. Indeed, as a brief survey of decisions illustrates, the Court's gerrymandering cases all carry this theme—that it is not mere suffering at the polls but discrimination in the polity with which the Constitution is concerned.

In *Whitcomb* v. *Chavis*, 403 U. S., at 149, we searched in vain for evidence that black voters "had less opportunity than did other . . . residents to participate in the political processes and to elect legislators of their choice." More generally, we remarked:

> "The mere fact that one interest group or another concerned with the outcome of [the district's] elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where . . . there is no indication that this segment of the population is being denied access to the political system." *Id*., at 154–155.

Again, in *White* v. *Regester*, *supra*, the same criteria were used to uphold the district court's finding that a redistricting plan was unconstitutional. The "historic and present condition" of the Mexican-American community, *id.,* at 767, a status of cultural and

economic marginality, *id*., at 768, as well as the legislature's unresponsiveness to the group's interests, *id*., at 768–769, justified the conclusion that Mexican-Americans were "`effectively removed from the political processes,'" and "invidiously excluded . . . from effective participation in political life." *Id*., at 769. Other decisions of this Court adhere to the same standards. See *Rogers* v. *Lodge*, 458 U. S. 613, 624–626 (1982); *Chapman* v. *Meier*, 420 U. S. 1, 17 (1975) (requiring proof that "the group has been denied access to the political process equal to the access of other groups").[2]

I summed up my views on this matter in the plurality opinion in *Davis* v. *Bandemer*, 478 U. S. 109 (1986).[3] Because districting inevitably is the expression of interest group politics, and because "the power to influence the political process is not limited to winning elections," *id*., at 132, the question in gerrymandering cases is "whether a particular group has been unconstitutionally denied its chance to effectively influence the political process." *Id*., at

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[2]It should be noted that §2 of the Voting Rights Act forbids any State from imposing specified devices or procedures that result in a denial or abridgement of the right to vote on account of race or color. Section 2 also provides that a violation of that prohibition "is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected] class . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. §1973(b).

[3]Although *Davis* involved political groups, the principles were expressly drawn from the Court's racial gerrymandering cases. See 478 U. S., at 131, n. 12 (plurality opinion).

132–133. Thus, "an equal protection violation may be found only where the electoral system *substantially disadvantages certain voters in their opportunity to influence the political process effectively*." *Id*., at 133 (emphasis added). By this, I meant that the group must exhibit "strong indicia of lack of political power and the denial of fair representation," so that it could be said that it has "essentially been shut out of the political process." *Id*., at 139. In short, even assuming that racial (or political) factors were considered in the drawing of district boundaries, a showing of discriminatory effects is a "threshold requirement" in the absence of which there is no equal protection violation, *id*., at 143, and no need to "reach the question of the state interests . . . served by the particular districts." *Id*., at 142.[4]

To distinguish a claim that alleges that the redistricting scheme has discriminatory intent and effect from one that does not has nothing to do with

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[4]Although disagreeing with the Court's holding in *Davis* that claims of political gerrymandering are justiciable, see *id.,* at 144 (O'CONNOR, J., concurring in judgment), the author of today's opinion expressed views on racial gerrymandering quite similar to my own:

"[W]here a racial minority group is characterized by `the traditional indicia of suspectness' and is vulnerable to exclusion from the political process . . . individual voters who belong to that group enjoy some measure of protection against intentional dilution of their group voting strength by means of racial gerrymandering. . . . Even so, *the individual's right is infringed only if the racial minority can prove that it has `essentially been shut out of the political process*.'" *Id*., at 151–152 (emphasis added). As explained below, that position cannot be squared with the one taken by the majority in this case.

dividing racial classifications between the "benign" and the malicious—an enterprise which, as the majority notes, the Court has treated with skepticism. *See ante*, at 11. Rather, the issue is whether the classification based on race discriminates against *anyone* by denying equal access to the political process. Even members of the Court least inclined to approve of race-based remedial measures have acknowledged the significance of this factor. See *Fullilove* v. *Klutznick*, 448 U. S. 448, 524–525, n. 3 (1980) (Stewart, J., dissenting) ("No person in [*UJO*] was deprived of his electoral franchise"); *Regents of Univ. of California* v. *Bakke*, 438 U. S. 265, 304–305 (1978) (Powell, J.) ("*United Jewish Organizations* . . . properly is viewed as a case in which the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, *without excluding individuals belonging to any other group from enjoyment of the relevant opportunity—meaningful participation in the electoral process*") (emphasis added).

The most compelling evidence of the Court's position prior to this day, for it is most directly on point, is *UJO*, 430 U. S. 144 (1977). The Court characterizes the decision as "highly fractured," *ante*, at 19, but that should not detract attention from the rejection by a majority in *UJO* of the claim that the State's intentional creation of majority-minority districts transgressed constitutional norms. As stated above, five Justices were of the view that, absent any contention that the proposed plan was adopted with the intent, or had the effect, of unduly minimizing the white majority's voting strength, the Fourteenth Amendment was not implicated. Writing for three members of the Court, I justified this conclusion as follows:

"It is true that New York deliberately increased

> the nonwhite majorities in certain districts in order to enhance the opportunity for election of nonwhite representatives from those districts. Nevertheless, there was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength." 430 U. S., at 165 (opinion of WHITE, J.).

In a similar vein, Justice Stewart was joined by Justice Powell in stating that:

> "The petitioners have made no showing that a racial criterion was used as a basis for denying them their right to vote, in contravention of the Fifteenth Amendment. See *Gomillion* v. *Lightfoot*, 364 U. S. 339. They have made no showing that the redistricting scheme was employed as part of a `contrivance to segregate'; to minimize or cancel out the voting strength of a minority class or interest; or otherwise to impair or burden the opportunity of affected persons to participate in the political process." *Id.*, at 179 (Stewart, J., concurring in judgment) (citations omitted).

Under either formulation, it is irrefutable that appellants in this proceeding likewise have failed to state a claim. As was the case in New York, a number of North Carolina's political subdivisions have interfered with black citizens' meaningful exercise of the franchise, and are therefore subject to §§4 and 5 of the Voting Rights Act. Compare *UJO, supra*, at 148. In other words, North Carolina was found by Congress to have "`resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees'" and therefore "would be likely to engage in `similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.'" *McCain* v. *Lybrand*, 465 U. S. 236, 245 (1984) (quoting *South Carolina* v. *Katzenbach*, 383 U. S. 301, 334, 335

(1966)).[5] Like New York, North Carolina failed to prove to the Attorney General's satisfaction that its proposed redistricting had neither the purpose nor the effect of abridging the right to vote on account of race or color. Compare *UJO*, *supra*, at 150. The Attorney General's interposition of a §5 objection "properly is viewed" as "an administrative finding of discrimination" against a racial minority. *Regents of Univ. of California* v. *Bakke, supra*, at 305 (opinion of Powell, J.). Finally, like New York, North Carolina reacted by modifying its plan and creating additional majority-minority districts. Compare *UJO*, 430 U. S., at 151–152.

In light of this background, it strains credulity to suggest that North Carolina's purpose in creating a second majority-minority district was to discriminate against members of the majority group by "impair[ing] or burden[ing their] opportunity . . . to participate in the political process." *Id*., at 179 (Stewart, J., concurring in judgment). The State has made no mystery of its intent, which was to respond to the Attorney General's objections, see Brief for State Appellees 13–14, by improving the minority group's prospects of electing a candidate of its choice. I doubt that this constitutes a discriminatory purpose as defined in the Court's equal protection cases—*i.e.*, an intent to aggravate "the unequal distribution of electoral power." *Post*, at 3 (STEVENS, J., dissenting). But even assuming that it does, there is no question that appellants have not alleged the requisite discriminatory effects. Whites constitute roughly 76 percent of the total population and 79

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[5]In *Thornburg* v. *Gingles*, 478 U. S. 30, 38 (1986), we noted the district court's findings that "North Carolina had officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing a poll tax [and] a literacy test."

percent of the voting age population in North Carolina. Yet, under the State's plan, they still constitute a voting majority in 10 (or 83 percent) of the 12 congressional districts. Though they might be dissatisfied at the prospect of casting a vote for a losing candidate—a lot shared by many, including a disproportionate number of minority voters—surely they cannot complain of discriminatory treatment.[6]

The majority attempts to distinguish *UJO* by imagining a heretofore unknown type of constitutional claim. In its words, "*UJO* set forth a standard under which white voters can establish unconstitutional vote dilution. . . . Nothing in the decision precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification." *Ante*, at 21. There is no support for this distinction in *UJO*, and no authority in the cases relied on by the Court either. More importantly, the majority's submission does not withstand analysis. The logic of its theory appears to be that race-conscious redistricting that "segregates" by drawing odd-shaped lines is qualitatively different from race-

[6]This is not to say that a group that has been afforded roughly proportional representation *never* can make out a claim of unconstitutional discrimination. Such districting might have both the intent and effect of "packing" members of the group so as to deprive them of any influence in other districts. Again, however, the equal protection inquiry should look at the group's overall influence over, and treatment by, elected representatives and the political process as a whole.

conscious redistricting that affects groups in some other way. The distinction is without foundation.

The essence of the majority's argument is that *UJO* dealt with a claim of vote dilution—which required a specific showing of harm—and that cases such as *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), and *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), dealt with claims of racial segregation—which did not. I read these decisions quite differently. Petitioners' claim in *UJO* was that the State had "violated the Fourteenth and Fifteenth Amendments by *deliberately revising its reapportionment plan along racial lines*." 430 U. S., at 155 (plurality opinion) (emphasis added). They also stated: "`Our argument is . . . that the history of the area demonstrates that there could be —and in fact was—*no reason other than race* to divide the community at this time.'" *Id*., at 154, n. 14 (quoting Brief for Petitioners, O. T. 1976, No. 75–104, p. 6, n. 6) (emphasis in original). Nor was it ever in doubt that "the State deliberately used race in a purposeful manner." 430 U. S., at 165. In other words, the "analytically distinct claim" the majority discovers today was in plain view and did not carry the day for petitioners. The fact that a demonstration of discriminatory effect was required in that case was not a function of the kind of claim that was made. It was a function of the type of injury upon which the Court insisted.

Gomillion is consistent with this view. To begin, the Court's reliance on that case as the font of its novel type of claim is curious. Justice Frankfurter characterized the complaint as alleging a deprivation of the right to vote in violation of the *Fifteenth* Amendment. See 364 U. S., at 341, 346. Regardless whether that description was accurate, see *ante*, at 13, it seriously deflates the precedential value which the majority seeks to ascribe to *Gomillion:* As I see it,

the case cannot stand for the proposition that the intentional creation of majority-minority districts, without more, gives rise to an equal protection challenge under the Fourteenth Amendment. But even recast as a Fourteenth Amendment case, *Gomillion* does not assist the majority, for its focus was on the alleged *effect* of the city's action, which was to exclude black voters from the municipality of Tuskegee. As the Court noted, the "inevitable effect of this redefinition of Tuskegee's boundaries" was "to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee." 364 U. S., at 341. Even Justice Whittaker's concurrence appears to be premised on the notion that black citizens were being "fenc[ed] out" of municipal benefits. *Id*., at 349. Subsequent decisions of this Court have similarly interpreted *Gomillion* as turning on the unconstitutional effect of the legislation. See *Palmer* v. *Thompson*, 403 U. S. 217, 225 (1971); *United States* v. *O'Brien*, 391 U. S. 367, 385 (1968). In *Gomillion*, in short, the group that formed the majority at the state level purportedly set out to manipulate city boundaries in order to remove members of the minority, thereby denying them valuable municipal services. No analogous purpose or effect has been alleged in this case.

The only other case invoked by the majority is *Wright* v. *Rockefeller, supra.* *Wright* involved a challenge to a legislative plan that created four districts. In the Seventeenth, Nineteenth, and Twentieth Districts, Whites constituted respectively 94.9%, 71.5%, and 72.5% of the population. 86.3% percent of the population in the Eighteenth District was classified as nonwhite or Puerto Rican. See *Wright* v. *Rockefeller,* 211 F. Supp. 460, 472 (SDNY 1962) (Murphy, J., dissenting); 376 U. S., at 54. The plaintiffs alleged that the plan was drawn with the intent to segregate voters on the basis of race, in violation of the Fourteenth and Fifteenth Amend-

ments. *Id*., at 53–54. The Court affirmed the District Court's dismissal of the complaint on the ground that plaintiffs had not met their burden of proving discriminatory intent. See *id*., at 55, 58. I fail to see how a decision based on a failure to establish discriminatory *intent* can support the inference that it is unnecessary to prove discriminatory *effect*.

Wright is relevant only to the extent that it illustrates a proposition with which I have no problem: That a complaint stating that a plan has carved out districts on the basis of race *can*, under certain circumstances, state a claim under the Fourteenth Amendment. To that end, however, there must be an allegation of discriminatory purpose and effect, for the constitutionality of a race-conscious redistricting plan depends on these twin elements. In *Wright*, for example, the facts might have supported the contention that the districts were intended to, and did in fact, shield the Seventeenth District from any minority influence and "pack" black and Puerto Rican voters in the Eighteenth, thereby invidiously minimizing their voting strength. In other words, the purposeful creation of a majority-minority district could have discriminatory effect if it is achieved by means of "packing"—*i.e.,* over-concentration of minority voters. In the present case, the facts could sustain no such allegation.

Lacking support in any of the Court's precedents, the majority's novel type of claim also makes no sense. As I understand the theory that is put forth, a redistricting plan that uses race to "segregate" voters by drawing "uncouth" lines is harmful in a way that a plan that uses race to distribute voters differently is not, for the former "bears an uncomfortable resemblance to political apartheid." See *ante*, at 16. The distinction is untenable.

Racial gerrymanders come in various shades: At-

large voting schemes, see, *e.g.*, *White* v. *Regester*, 412 U. S. 755 (1973); the fragmentation of a minority group among various districts "so that it is a majority in none," *Voinovich* v. *Quilter*, 507 U. S. ___, ___ (1993)(slip op., at 6), otherwise known as "cracking," cf. *Connor* v. *Finch*, 431 U. S. 407, 422 (1977); the "stacking" of "a large minority population concentration . . . with a larger white population," Parker, Racial Gerrymandering and Legislative Reapportionment, in Minority Vote Dilution 85, 92 (C. Davidson ed. 1984); and, finally, the "concentration of [minority voters] into districts where they constitute an excessive majority," *Thornburg* v. *Gingles*, 478 U. S. 30, 46, n. 11 (1986), also called "packing," *Voinovich*, *supra*, at ___ (slip op., at 6). In each instance, race is consciously utilized by the legislature for electoral purposes; in each instance, we have put the plaintiff challenging the district lines to the burden of demonstrating that the plan was meant to, and did in fact, exclude an identifiable racial group from participation in the political process.

Not so, apparently, when the districting "segregates" by drawing odd-shaped lines.[7] In that case, we are told, such proof no longer is needed. Instead, it is the *State* that must rebut the allegation that race was taken into account, a fact that, together with the legislators' consideration of ethnic,

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[7]I borrow the term "segregate" from the majority, but, given its historical connotation, believe that its use is ill-advised. Nor is it a particularly accurate description of what has occurred. The majority-minority district that is at the center of the controversy is, according to the State, 54.71% African-American. Brief for State Appellees 5, n. 6. Even if racial distribution was a factor, no racial group can be said to have been "segregated"—i.e., "set apart" or "isolate[d]." Webster's Collegiate Dictionary 1063 (9th ed. 1983).

religious, and other group characteristics, I had thought we practically took for granted, see *supra*, at 3. Part of the explanation for the majority's approach has to do, perhaps, with the emotions stirred by words such as "segregation" and "political apartheid." But their loose and imprecise use by today's majority has, I fear, led it astray. See n. 7, *supra.* The consideration of race in "segregation" cases is no different than in other race-conscious districting; from the standpoint of the affected groups, moreover, the line-drawings all act in similar fashion.[8] A plan that "segregates" being functionally indistinguishable from any of the other varieties of gerrymandering, we should be consistent in what we require from a claimant: Proof of discriminatory purpose and effect.

The other part of the majority's explanation of its holding is related to its simultaneous discomfort and fascination with irregularly shaped districts. Lack of compactness or contiguity, like uncouth district lines, certainly is a helpful indicator that some form of gerrymandering (racial or other) might have taken place and that "something may be amiss." *Karcher* v. *Daggett*, 462 U. S. 725, 758 (1983) (STEVENS, J., concurring). Cf. *Connor, supra,* at 425. Disregard for geographic divisions and compactness often goes hand in hand with partisan gerrymandering. See *Karcher*, *supra*, at 776 (WHITE, J., dissenting); *Wells* v. *Rockefeller*, 394 U. S. 542, 554 (1969) (WHITE, J., dissenting).

But while district irregularities may provide strong indicia of a potential gerrymander, they do no more than that. In particular, they have no bearing on

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[8]The black plaintiffs in *Gomillion* v. *Lightfoot*, 346 U. S. 339 (1960), I am confident, would have suffered equally had whites in Tuskegee sought to maintain their control by annexing predominantly white suburbs, rather than splitting the municipality in two.

whether the plan ultimately is found to violate the Constitution. Given two districts drawn on similar, race-based grounds, the one does not become more injurious than the other simply by virtue of being snake-like, at least so far as the Constitution is concerned and absent any evidence of differential racial impact. The majority's contrary view is perplexing in light of its concession that "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts." *Gaffney*, 412 U. S., at 752, n. 18; see *ante*, at __. It is shortsighted as well, for a regularly shaped district can just as effectively effectuate racially discriminatory gerrymandering as an odd-shaped one.[9] By focusing on looks rather than impact, the majority "immediately casts attention in the wrong direction — toward superficialities of shape and size, rather than toward the political realities of district composition." R. Dixon, Democratic Representation: Reapportionment in Law and Politics 459 (1968).

Limited by its own terms to cases involving unusually-shaped districts, the Court's approach nonetheless will unnecessarily hinder to some extent a State's voluntary effort to ensure a modicum of minority representation. This will be true in areas where the minority population is geographically dispersed. It also will be true where the minority population is not scattered but, for reasons unrelated

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[9]As has been remarked, "[d]ragons, bacon strips, dumbbells and other strained shapes are not always reliable signs that partisan (or racial or ethnic or factional) interests are being served, while the most regularly drawn district may turn out to have been skillfully constructed with an intent to aid one party." Sickels, Dragons, Bacon Strips, and Dumbbells— Who's Afraid of Reapportionment, 75 Yale L. J. 1300 (1966).

to race—for example incumbency protection—the State would rather not create the majority-minority district in its most "obvious" location.[10] When, as is the case here, the creation of a majority-minority district does not unfairly minimize the voting power of any other group, the Constitution does not justify, much less mandate, such obstruction. We said as much in *Gaffney:*

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[10]This appears to be what has occurred in this instance. In providing the reasons for the objection, the Attorney General noted that "[f]or the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district" and that such a district would have been no more irregular than others in the State's plan. See App. to Brief for Federal Appellees 10a. North Carolina's decision to create a majority-minority district can be explained as an attempt to meet this objection. Its decision not to create the more compact southern majority-minority district that was suggested, on the other hand, was more likely a result of partisan considerations. Indeed, in a suit brought prior to this one, different plaintiffs charged that District 12 was "grossly contorted" and had "no logical explanation other than incumbency protection and the enhancement of Democratic partisan interests. . . . The plan . . . ignores the directive of the [Department of Justice] to create a minority district in the southeastern portion of North Carolina since any such district would jeopardize the reelection of . . . the Democratic incumbent." App. to Jurisdictional Statement 43a (Complaint in *Pope* v. *Blue*, No. 3:92CV71–P (WDNC)). With respect to this incident, one writer has observed that "understanding why the configurations are shaped as they are requires us to know at least as much about the interests of incumbent Democratic politicians, as it does knowledge of the Voting Rights Act." Grofman, Would

> "[C]ourts have [no] constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." 412 U. S., at 754.

Although I disagree with the holding that appellants' claim is cognizable, the Court's discussion of the level of scrutiny it requires warrants a few comments. I have no doubt that a State's compliance with the Voting Rights Act clearly constitutes a compelling interest. Cf. *UJO*, 430 U. S., at 162–165 (opinion of WHITE, J.); *id.*, at 175–179 (Brennan, J., concurring in part); *id.*, at 180 (Stewart, J., concurring in judgment). Here, the Attorney General objected to the State's plan on the ground that it failed to draw a second majority-minority district for what appeared to be pretextual reasons. Rather than challenge this conclusion, North Carolina chose to draw the second district. As *UJO* held, a State is entitled to take such action. See also, *Wygant* v. *Jackson Bd. of Education*, 476 U. S. 267, 291 (O'CONNOR, J., concurring in part and concurring in judgment).

The Court, while seemingly agreeing with this

Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the *Only* Thing"?, 14 Cardozo L. Rev. 1237, 1258 (1993). The District Court in *Pope* dismissed appellants' claim, reasoning in part that "plaintiffs do not allege, nor can they, that the state's redistricting plan has caused them to be `shut out of the political process.'" *Pope* v. *Blue,* 809 F. Supp. 392, 397 (WDNC 1992). We summarily affirmed that decision. 506 U. S. ___ (1992).

position, warns that the State's redistricting effort must be "narrowly tailored" to further its interest in complying with the law. *Ante*, at __. It is evident to me, however, that what North Carolina did was precisely tailored to meet the objection of the Attorney General to its prior plan. Hence, I see no need for a remand at all, even accepting the majority's basic approach to this case.

Furthermore, how it intends to manage this standard, I do not know. Is it more "narrowly tailored" to create an irregular majority-minority district as opposed to one that is compact but harms other State interests such as incumbency protection or the representation of rural interests? Of the following two options—creation of two minority influence districts or of a single majority-minority district—is one "narrowly tailored" and the other not? Once the Attorney General has found that a proposed redistricting change violates §5's nonretrogression principle in that it will abridge a racial minority's right to vote, does "narrow tailoring" mean that the most the State can do is preserve the *status quo*? Or can it maintain that change, while attempting to enhance minority voting power in some other manner?

This small sample only begins to scratch the surface of the problems raised by the majority's test. But it suffices to illustrate the unworkability of a standard that is divorced from any measure of constitutional harm. In that, State efforts to remedy minority vote dilution are wholly unlike what typically has been labeled "affirmative action." To the extent that no other racial group is injured, remedying a Voting Rights Act violation does not involve preferential treatment. Compare *Wygant, supra*, at 295 (WHITE, J., concurring in judgment). It involves, instead, an attempt to *equalize* treatment, and to provide minority voters with an effective voice in the political process. The Equal Protection Clause of the Constitution, surely, does not stand in the way.

Since I do not agree that petitioners alleged an Equal Protection violation and because the Court of Appeals faithfully followed the Court's prior cases, I dissent and would affirm the judgment below.