SUPREME COURT OF THE UNITED STATES

Nos. 92–519, 92–593 AND 92–767

BOLLEY JOHNSON, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS
92–519 *v.*
MIGUEL DE GRANDY ET AL.

MIGUEL DE GRANDY, ET AL., APPELLANTS
92–593 *v.*
BOLLEY JOHNSON, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES, ET AL.

UNITED STATES, APPELLANT
92–767 *v.*
FLORIDA ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

[June 30, 1994]

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

At trial, the plaintiffs alleged that the State violated §2 of the Voting Rights Act of 1965, 42 U. S. C. §1973, by not creating as many majority-minority districts as was feasible. The District Court agreed and found a violation of §2, thus equating impermissible vote dilution with the failure to maximize the number of majority-minority districts. I agree with the Court that the District Court's maximization theory was an erroneous application of §2.

A more difficult question is whether proportionality, ascertained by comparing the number of majority-minority districts to the minority group's proportion of the relevant population, is relevant in deciding whether there has been vote dilution under §2 in a challenge to election district lines. The statutory text does not yield a clear answer.

The statute, in relevant part, provides: "The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered [in determining whether there has been vote dilution]: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." §1973(b) (emphasis in original). By its terms, this language addresses the number of minorities elected to office, not the number of districts in which minorities constitute a voting majority. These two things are not synonymous, and it would be an affront to our constitutional traditions to treat them as such. The assumption that majority-minority districts elect only minority representatives, or that majority-white districts elect only white representatives, is false as an empirical matter. See *Voinovich* v. *Quilter*, 507 U. S. ___, ___ (1993) (slip op., at 4, 11); A. Thernstrom, Whose Votes Count? Affirmative Action and Minority Voting Rights 210–216 (1987); C. Swain, Black Faces, Black Interests, ch. 6 (1993). And on a more fundamental level, the assumption reflects "the demeaning notion that members of the defined racial groups ascribe to certain `minority views' that must be different from those of other citizens." *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 636 (1990) (KENNEDY, J., dissenting); see also *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 186–187 (1977) (Burger, C. J., dissenting).

Although the statutory text does not speak in precise terms to the issue, our precedents make clear that proportionality, or the lack thereof, has some relevance to a vote dilution claim under §2. In a unanimous decision last Term, we recognized that single-member districts were subject to vote dilution challenges under §2, and further that "[d]ividing [a politically cohesive] minority group among various [single-member] districts so that it is a majority in none" is one "device for diluting minority voting power" within the meaning of the statute. *Voinovich*

v. *Quilter*, 507 U. S., at ___ (slip op., at 5–6). If "the fragmentation of a minority group among various districts" is an acknowledged dilutive device, *id.*, at ___ (slip op., at 6), it follows that analysis under §2 takes some account of whether the number of majority-minority districts falls short of a statistical norm. Cf. *Washington* v. *Davis*, 426 U. S. 229, 242 (1976) (discriminatory impact relevant to allegation of intentional discrimination). Both the majority and concurring opinions in *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), reflect the same understanding of the statute. See *id.*, at 50, n. 16 (In a "gerrymander case, plaintiffs might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multimember or single-member districts, with the effect of diluting the potential strength of the minority vote"); *id.*, at 84 (O'CONNOR, J., concurring in judgment) ("[A]ny theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large"). Indeed, to say that proportionality is irrelevant under the §2 results test is the equivalent of saying (contrary to our precedents) that no §2 vote dilution challenges can be brought to the drawing of single-member districts.

To be sure, placing undue emphasis upon proportionality risks defeating the goals underlying the Voting Rights Act of 1965, as amended. See *Gingles*, *supra*, at 99 (O'CONNOR, J., concurring in judgment). As today's decision provides, a lack of proportionality is "never dispositive" proof of vote dilution, just as the presence of proportionality "is not a safe harbor for States [and] does not immunize their election schemes from §2 challenge." *Ante*, at 2 (O'CONNOR, J., concurring); see also *ante*, at 24, n. 17. But given our past construction of the statute, I would hesitate to conclude that proportionality has no relevance to the §2 inquiry.

It is important to emphasize that the precedents to which I refer, like today's decision, only construe the statute, and do not purport to assess its constitutional implications. See *Chisom* v. *Roemer*, 501 U. S. 380, 418 (1991) (KENNEDY, J., dissenting). Operating under the constraints of a statutory regime in which proportionality has some relevance, States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid §2 litigation. Likewise, a court finding a §2 violation might believe that the only appropriate remedy is to order the offending State to engage in race-based redistricting and create a minimum number of districts in which minorities constitute a voting majority. The Department of Justice might require (in effect) the same as a condition of granting preclearance, under §5 of the Act, 42 U. S. C. §1973c, to a State's proposed legislative redistricting. Those governmental actions, in my view, tend to entrench the very practices and stereotypes the Equal Protection Clause is set against. See *Metro Broadcasting, Inc.* v. *FCC, supra,* at 636–637 (KENNEDY, J., dissenting). As a general matter, the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions.

"The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 518 (1989) (KENNEDY, J., concurring in part and concurring in judgment). Racial classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and are presumed invalid. *Shaw* v. *Reno*, 509 U. S. ___, ___ (1993) (slip op., at 11) (internal quotation marks omitted); see also A. Bickel, The Morality of Consent 133 (1975). This is true regardless of "the race of those burdened or benefited by a particular classification." *Croson*, *supra*, at 494 (opinion of O'CONNOR, J.); 488 U. S., at 520 (SCALIA, J., concurring in judgment). Furthermore, "[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree." *Powers* v. *Ohio*, 499 U. S. 400, 410 (1991); see also *Plessy* v. *Ferguson*, 163 U. S. 537, 560 (1896) (Harlan, J., dissenting).

These principles apply to the drawing of electoral and political boundaries. As Justice Douglas, joined by Justice Goldberg, stated 30 years ago:

> "When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated . . . . Since that system is at war with the democratic ideal, it should find no footing here." *Wright* v. *Rockefeller*, 376 U. S. 52, 67 (1964) (dissenting opinion).

In like fashion, Chief Justice Burger observed that the "use of a mathematical formula" to assure a minimum number of majority-minority districts "tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or religious groups in enclaves." *United Jewish*

Organizations v. *Carey*, 430 U. S., at 186 (dissenting opinion). And last Term in *Shaw*, we voiced our agreement with these sentiments, observing that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." 509 U. S., at ___ (slip op., at 26).

Our decision in *Shaw* alluded to, but did not resolve, the broad question whether "the intentional creation of majority-minority districts, without more, always gives rise to an equal protection claim." *Id.*, at ___ (slip op., at 17) (internal quotation marks omitted); see also *id.*, at ___ (slip op., at 26). While recognizing that redistricting differs from many 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, religion and political persuasion," we stated that "the difficulty of determining from the face of a single-member districting plan that it purposefully distinguishes between voters on the basis of race" does "not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race." *Id.*, at ___ (emphasis in original) (slip op., at 14–15). We went on to hold that "a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race" must be subject to strict scrutiny under the Equal Protection Clause. *Id.*, at ___ (slip op., at 26); see also *id.*, at ___, ___ (slip op., at 17, 21). Given our decision in *Shaw*, there is good reason for state and federal officials with responsibilities related to redistricting, as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous

course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause. But no constitutional claims were brought here, and the Court's opinion does not address any constitutional issues. Cf. *Voinovich* v. *Quilter*, 507 U. S., at ___ (slip op., at 9).

With these observations, I concur in all but Parts III–B–2, III–B–4 and IV of the Court's opinion and in its judgment.